79-981

No.

# In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN N. MITCHELL, PETITIONER

*v.*

BERTRAM ZWEIBON, ET AL.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WADE H. MCCREE, JR.
*Solicitor General*

ALICE DANIEL
*Assistant Attorney General*

KENT L. JONES
*Assistant to the Solicitor General*

BARBARA L. HERWIG
LARRY L. GREGG
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Constitutional and statutory provisions involved | 2 |
| Statement | 4 |
| Reasons for granting the petition | 10 |
| Conclusion | 11 |


## CITATIONS

Cases:


| | |
|---|---|
| *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 | 7 |
| *United States* v. *United States District Court*, 407 U.S. 297 | 2, 6, 10 |
| *Wood* v. *Strickland*, 420 U.S. 308 | 7 |
| *Zweibon* v. *Mitchell ("Zweibon I")*, 516 F.2d 594 | 6-7, 8 |


Constitution, statutes and regulations:


| | |
|---|---|
| United States Constitution, Fourth Amendment | 2-3, 4, 8, 9 |
| Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 *et seq.* | 6 |
| Section 102(a), 92 Stat. 1786 | 6 |
| Section 104(a), 92 Stat. 1788-1789 | 6 |
| Section 201(c), 92 Stat. 1797 | 3, 7 |

Constitution, statutes and regulations—Continued — Page

Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. 2510 *et seq.* ..... 4

18 U.S.C. 2511(3) ..... 3-4
18 U.S.C. 2520 ..... 7

42 U.S.C. 1983 ..... 4
42 U.S.C. 1985 ..... 4

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

No.

JOHN N. MITCHELL, PETITIONER

*v.*

BERTRAM ZWEIBON, ET AL.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

The Solicitor General, on behalf of John N. Mitchell, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-22a) is not yet reported. The opinion of the district court (App. C, *infra*, 25a-36a) is reported at 444 F. Supp. 1296.

### JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 23a-24a) was entered on July 12, 1979. On

October 20, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Attorney General is absolutely immune from personal damages liability for acting on behalf of the President to authorize electronic surveillance for national security purposes.

2. Whether the Attorney General is entitled to a qualified immunity as a matter of law for authorizing a warrantless electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972).

3. Whether this Court's decision in *United States* v. *United States District Court*, and lower court rulings amplifying that decision, should be applied retroactively to create a personal damages liability for federal officers.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. 2511(3)[1] provided in pertinent part:

> (3) Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be other-

---

[1] 18 U.S.C. 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797. This statute which est,ablishes procedures for the conduct of electronic surveillance for national security purposes, was enacted nine years after the events that gave rise to this litigation.

wise used or disclosed except as is necessary to implement that power.

## STATEMENT

1. Respondents (16 members of the Jewish Defense League (JDL)) instituted this action on October 7, 1971, in the United States District Court for the District of Columbia against the then Attorney General of the United States, petitioner John N. Mitchell, and nine Special Agents of the Federal Bureau of Investigation. The suit followed disclosure by the government in two consolidated criminal cases that conversations of certain defendants and counsel had been overheard during an electronic surveillance of telephones in the JDL offices in New York City.[2] The electronic surveillance was conducted from October 1, 1970, through October 31, 1970, and again from January 5, 1971, through June 30, 1971. The surveillance had been authorized by Attorney General Mitchell, acting pursuant to the President's authority to conduct surveillance for national security purposes. The plaintiffs sought money damages, claiming that the surveillance violated the Fourth Amendment, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, and 42 U.S.C. 1983 and 1985.

On cross-motions for summary judgment based on affidavits and exhibits, the district court entered judgment for the defendants. 363 F. Supp. 936 (1973).

---

[2] *United States* v. *Bieber, et al.*, 71 CR 479 (E.D. N.Y.), and *United States* v. *Joffee, et al.*, 71 CR 480 (E.D. N.Y.).

The district court found that the Attorney General had authorized the surveillances only after determining that "the activities of the JDL were obviously detrimental to the continued peaceful relations between the United States and the Soviet Union and threatened the President's ability and contstitutional authority to conduct the foreign relations of this country." 363 F. Supp. at 942. The court noted that petitioner had not acted in a vacuum in authorizing the surveillances, but had "relied on the total knowledge received from the Department of State, and the National Security Council and from meetings with the Director of the FBI." *Id.* at 939. Moreover, the court found that numerous factors had influenced the Attorney General's judgment, such as the possibility of attacks on foreign dignitaries by the JDL during the 25th session of the General Assembly of the United Nations in October 1970, protests by the Soviet Union and its thinly-veiled threats of possible retaliation against United States diplomats and embassy personnel in Moscow, and the unfavorable consequences the JDL's activities could have on continued cooperation between the United States and the Soviet Union in ongoing diplomatic efforts. *Id.* at 938-942. The court found over twenty instances in which these concerns had been expressed by the State Department, by the United States Mission to the United Nations, and by the United States Ambassador to the Soviet Union.

The district court concluded that the facts noted above "show a clear threat to this country's foreign relations," that "the electronic surveillances were

installed * * * under the constitutional authority of the President over the conduct of foreign relations and his inherent power to protect our national security," and that prior judicial authorization for the surveillances was thus not required by the Fourth Amendment. 363 F.Supp. at 944. Additionally, the district court held that respondents' statutory claim under Title III must fail because in *United States* v. *United States District Court*, 407 U.S. 297, 306 (1972), this Court held that "the Act simply did not legislate with respect to national security surveillances." 363 F. Supp. at 943.

2. The court of appeals, sitting en banc, reversed. 516 F.2d 594 (1975) (*"Zweibon I"*). The court held that prior judicial authorization was required by the Fourth Amendment for foreign security surveillances unless the target of the surveillance was himself an agent of, or a collaborator with, a foreign power.[3] *Id.* at 614 (plurality opinion); *id.* at 689 (Wilkey, J., concurring in part). A plurality of the court also held that *"the procedures and remedies of [Title III] were to completely occupy the wire tap-*

---

[3] We do not seek review of this ruling because essentially the same result is now provided for by statute. See generally the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783. Indeed, under Section 104(a) of the Act, prior judicial authorization is now generally required even if the target of the surveillance is a foreign agent or collaborator. 92 Stat. 1788-1789. The President may, however, authorize such surveillance in limited circumstances without applying for a judicial order. Section 102(a) of the Act, 92 Stat. 1786-1787.

*ping field except to the extent that the President's powers were rendered constitutionally immune from the warrant procedure of the Fourth Amendment"* (*id.* at 666; emphasis in original) and that the remedies of Title III are therefore applicable to unconstitutional national security surveillances. The court concluded, however, that in determining the extent of the defendants' liability for authorizing and conducting a warrantless national security surveillance, the qualified immunity defense enunciated in *Wood* v. *Strickland*, 420 U.S. 308 (1975), as well as the good-faith defense provided under Title III itself (18 U.S.C. 2520), should be considered on remand. 516 F.2d at 670.[4]

3. After discovery was completed on remand, the district court granted petitioner's renewed motion for summary judgment.[5] Relying on this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 104 (1971), the district court held that the court of appeals' conclusion that a warrant was required by the Fourth Amendment in national security surveillances constituted a new principle of law that should

---

[4] Respondents petitioned for a writ of certiorari to seek review of the holding in *Zweibon I* that the defendants may raise a good-faith qualified immunity defense under Title III. Petitioner then filed a conditional cross-petition, challenging the portions of *Zweibon I* adverse to him. The Court denied the petitions. 425 U.S. 944 (1976).

[5] Respondents agreed on remand to dismiss their claims against the nine FBI agents (App. C, *infra*, 25a n.1). Petitioner Mitchell is thus the only remaining defendant in this action.

not be applied retroactively to create personal damages liability (App. C, *infra*, 28a-35a). The district court noted that the lawfulness of warrantless national security surveillances consistently had been upheld by the lower courts prior to the decision of the court of appeals in *Zweibon I* and that the purpose of furthering the protections of the Fourth Amendment would not be advanced by retroactive creation of damages liability in these circumstances (*id.* at 30a-34a). The court also observed that creation of a private damages remedy for actions that were not recognized to be unlawful when done might constitute an unconstitutional ex post facto imposition of liability (*id.* at 34a). Finally, the court concluded that these same concerns barred respondents' claims for relief under Title III (*id.* at 35a-37a & n.5).

4. The court of appeals again reversed the district court's judgment (App. A, *infra*). The court of appeals held that the decisions in *United States* v. *United States District Court* and *Zweibon I* should be applied retroactively to establish a cause of action under the Fourth Amendment for warrantless national security surveillance of persons not agents or collaborators of foreign powers. The court held that the decisions did not announce a new principle of law but "simply applied the constitutional warrant requirement to national security situations" (App. A, *infra*, 12a). The court suggested that an Attorney General who chooses to rely on lower court decisions to guide his action does so at his own risk (*id.* at 12a-13a n.37, 18a n.49). Moreover, the court rea-

soned that, on balance, the equities favor retroactive application of newly-announced Fourth Amendment standards in damages action (*id.* at 17a-18a).

With regard to liability under Title III, however, the court of appeals recognized that its prior holding in *Zweibon I* that this statute applies to warrantless national security surveillances "represented the sort of sharp break in the law which should be restricted to prospective effect" (App. A, *infra*, 20a). But the court held that Title III liability might nonetheless be established in this case if, on remand, respondents can show that the surveillance was not primarily motivated by national security purposes but was instead motivated by the desire to obtain evidence for prosecutorial purposes (*id.* at 9a).[6]

The court of appeals refused to rule on petitioner's claims of absolute immunity and qualified immunity as a matter of law, which were briefed and argued as alternative bases to support the judgment of the district court (Appellee's Br. 50-68). The court of appeals noted that petitioner had raised these defenses in the district court (see 363 F. Supp. at 944) but that the district court had not yet had occasion to consider them (App. A, *infra*, 4a n.8).

---

[6] The court of appeals remanded this issue for trial even though the district court previously had ruled that the search was plainly motivated by national security reasons (App. C, *infra*, 26a; 363 F. Supp. at 939-942). We do not seek review of this ruling of the court of appeals for the reason stated in note 8 of the petition for a writ of certiorari filed on this date in *Kissinger* v. *Halperin*.

## REASONS FOR GRANTING THE PETITION

This case raises important and unsettled questions concerning the immunity of high-level Executive Branch officials from damages liability and the retroactivity of this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972). The identical questions are presented in our petition for a writ of certiorari in *Kissinger* v. *Halperin*, along with a complete statement of the reasons why these questions warrant this Court's review.[7] We therefore believe that the disposition of this petition should be deferred pending disposition of the petition in *Kissinger*.[8]

---

[7] We are providing counsel for respondents with a copy of our petition in *Kissinger*.

[8] Although the court of appeals ostensibly refused to decide whether the Attorney General is immune from damages liability in the context of this case, its decision in *Kissinger*—which was decided on the same date—clearly forecloses the defense of absolute immunity or qualified immunity as a matter of law. Because these purely legal questions were expressly decided in *Kissinger*, it is preferable to review the issue in the context of that case.

## CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of *Kissinger* v. *Halperin.*

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

ALICE DANIEL
*Assistant Attorney General*

KENT L. JONES
*Assistant to the Solicitor General*

BARBARA L. HERWIG
LARRY L. GREGG
*Attorneys*

DECEMBER 1979

**APPENDIX A**

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 78-1348

BERTRAM ZWEIBON ET AL., APPELLANTS

*v.*

JOHN N. MITCHELL, Individually and as Attorney General of the United States, ET AL.

---

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 2025-71)

---

Argued February 9, 1979

Decided July 12, 1979

Before WRIGHT, *Chief Judge*, ROBINSON, *Circuit Judge*, and GESELL,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

WRIGHT, *Chief Judge:* Appellants, members of the Jewish Defense League (JDL), sued former Attorney

---

* Of the United States District Court for the District of Columbia, sitting by desigination pursuant to 28 U.S.C. § 292(a) (1976).

General John N. Mitchell and nine agents of the Federal Bureau of Investigation (FBI) for damages for wiretapping of the JDL's New York office in 1970 and 1971. The District Court dismissed the case because it refused to apply retroactively the constitutional requirement of a warrant for national security wiretaps that was articulated in *United States* v. *United States District Court* (*Keith*), 407 U.S. 297 (1972), and in *Zweibon* v. *Mitchell* (*Zweibon I*), 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976). Similarly, the District Court limited to prospective effect the conclusion of the plurality in *Zweibon I* that some of the procedures and remedies of Title III of the Omnibus Crime Control and Safe Streets Act of 1968[1] are relevant to those national security surveillances that violate the Fourth Amendment. Since both holdings dispose of only part of appellants' complaint, however, there was no basis for dismissing the entire suit. Moreover, we decline to restrict the constitutional warrant requirement of *Keith* and *Zweibon I* to prospective effect in damage suits like this one. Finally, we affirm the District Court's ruling on the *Zweibon I* plurality's view of the statutory question.

The facts underlying this action are set out in detail in our opinion in *Zweibon I*, so we will note only the salient points here. In the late 1960s the JDL staged occasionally violent demonstrations against Soviet installations and personnel in New York to

---

[1] Pub. L. No. 90-351, 82 STAT. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1976)).

protest the treatment of Jews in Russia. The JDL program drew complaints from the Soviets, along with thinly veiled threats of reprisal against Americans in the Soviet Union.[2] In addition, suspected and anticipated JDL actions constituted violations of several criminal statutes.[3] In October 1970, and between January and July 1971, the Government wiretapped six telephones at JDL headquarters.

The existence of the JDL wiretaps came to light in June 1971 during the trial of several JDL members on criminal charges,[4] and this suit for damages under the Fourth Amendment and Title III followed. The District Court granted summary judgment in favor of defendants on July 20, 1973,[5] but this court, acting *en banc*, reversed that ruling in *Zweibon I*. Drawing on the Supreme Court's decision in *Keith*, we found that the Government could not constitutionally place a wiretap on appellants' telephones without first ac-

---

[2] *See* Joint Appendix (JA) 81-83, 88-89, 112-113, 148-149 (Department of State documents detailing Russian anger over JDL activities).

[3] *See* JA 68-69 (Sept. 14, 1970 memorandum from FBI Director J. Edgar Hoover citing "violence" and "injury to private citizens and law enforcement officers" from JDL activities and JDL threat to hijack airplanes); brief for respondents, Addendum at 3 (April 1971 State Department cable referring to Russian protest over alleged JDL bombing of Soviet office in New York).

[4] *See United States* v. *Bieber*, 71 C.R. 479 (E.D. N.Y.); *United States* v. *Joffee*, 71 C.R. 480 (E.D. N.Y.).

[5] *Zweibon* v. *Mitchell*, 363 F.Supp. 936 (D. D.C. 1973).

quiring a judicial warrant.[6] In September 1977 we also reversed the District Court's decision that the plaintiffs were not entitled to a jury trial.[7] The ruling we consider today came in response to renewed motions for summary judgment by appellees.[8]

## II

The problem of determining the retroactive effect of a "new" judicial ruling goes to the heart of what courts do. Chief Justice Hughes described such decisions as "among the most difficult of those which have engaged the attention of the courts."[9] The traditional view is that decisions overruling prior holdings or announcing novel doctrine must be applied to all subsequent cases, even if the later cases involve incidents that took place before the crucial judicial ruling.[10] In such cases, according to Blackstone,

---

[6] *Zweibon* v. *Mitchell* (*Zweibon I*), 516 F.2d 594, 611-654 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

[7] *In re Zweibon* (*Zweibon II*), 565 F.2d 742 (D.C. Cir. 1977) (*per curiam*).

[8] *Zweibon* v. *Mitchell*, 444 F.Supp. 1296 (D. D.C. 1978), Pending the Supreme Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), appellees did not advance in this action their earlier contention as to official immunity. Due to its decision on retroactivity, the District Court also did not reach appellees' "good faith" defense. *Zweibon* v. *Mitchell*, *supra*, 444 F.Supp. at 1298.

[9] *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940).

[10] *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.402, at 171 (2d ed. 1974). Justice Holmes stated the proposition quite strongly

"judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." [11] Thus for Blackstone judicial overruling reflects not the decision that the previous approach was "*bad law*, but that it was *not law*." [12]

For many years the Supreme Court only occasionally ignored the Blackstonian view of retroactivity by restricting reversal of earlier law to prospective effect.[13] In the 1960s, however, the Court established prospectively a number of constitutional rules protecting the rights of criminal defendants.[14] Prospec-

---

in *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting): "In know of no authority in this court to say that in general * * * decisions shall make law only for the future. Judicial decisions have had retroactive operation for near a thousand years." *See also* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L. J. 907 (1962).

[11] 1 W. BLACKSTONE, COMMENTARIES *70 (Cooley's 4th ed. 1899).

[12] *Id.* (emphasis in original). A similar note with respect to unconstitutional legislation was struck by Justice Field in *Norton* v. *Shelby County*, 118 U.S. 425, 442 (1886); "[Such an] act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *See also United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801). For a more modern explanation of the presumption in favor of retroactivity, *see* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142-143 (1921).

[13] *See, e.g., Douglass* v. *County of Pike*, 101 U.S. (11 Otto) 677, 687 (1879); *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

[14] *See, e.g., Linkletter* v. *Walker*, 381 U.S. 618 (1965) (prospective application of exclusionary rule of *Mapp* v. *Ohio*,

tive overruling can preserve the flexibility of judge-made law without causing unacceptable social upheaval, but the technique has two substantial drawbacks. First, it carries all the earmarks of legislative action with none of the democratic procedures.[15] Second, it is difficult as a logical proposition to maintain that a new doctrine should be established, yet that prior doctrine applies to cases reaching the courts after that decision so long as they involve events that occurred before that point. As Justice Harlan wrote:

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. * * *[16]

Historically, prospectivity has been less common in civil than in criminal cases.[17] This is at least partly

---

367 U.S. 643 (1961)); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) (prospective application of rule of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), on presence of counsel at police interrogation); *Stovall* v. *Denno*, 388 U.S. 293 (1967) (prospective application of rule of *United States* v. *Wade*, 388 U.S. 218 (1967), on right to counsel at lineup).

[15] *See* Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L. J. 533, 536-537 (1977); Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60-62 (1965); Note, *supra* note 10, 71 YALE L. J. at 931-932.

[16] *Desist* v. *United States*, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

[17] *See Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 20 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972) (noting "almost no

due to the potential flood of *habeas corpus* petitions that looms if a court recognizes retroactively a procedural or substantive right of criminal defendants.[18] No such threat arises in civil litigation where a retroactive decision can affect only suits pending in the courts or not yet brought, but cannot be raised by previously unsuccessful litigants. The prospectivity determination in both civil and criminal cases, however, remains a pragmatic one that turns on the expected impact of a retroactive overruling on the

---

suggestion" in criminal cases announcing prospective rules "that this line of authority should be applied to civil litigation").

The Supreme Court has permitted prospectivity in civil cases involving interpretations of law that might void municipal bonds, *e.g.*, *Gelpcke* v. *Dubuque*, 68 U.S. (1 Wall.) 175 (1863); *Douglass* v. *County of Pike*, *supra* note 13; *Taylor* v. *Ypsilanti*, 105 U.S. (15 Otto) 60 (1881); *Anderson* v. *Santa Anna*, 116 U.S. 356 (1886); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *City of Phoenix* v. *Kolodzeijski*, 399 U.S. 204 (1970); *see also Chicot County Drainage District* v. *Baxter State Bank*, *supra* note 9 (denying retroactive effect to prevent bondholders from voiding renegotiation of obligations), or that might generally work an undue burden on individual litigants, *e.g.*, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) (allowing tort suit to proceed despite intervening decision making different statute of limitations applicable); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969) (first interpretation of federal voting statute); *England* v. *State Board of Medical Examiners*, 375 U.S. 411 (1964) (announcing rule that submission of federal claims to state court bars subsequent action in federal court, but not applying rule to appellants).

[18] *Cf. Desist* v. *United States*, *supra* note 16, 394 U.S. at 260-269.

society and legal system. Retroactivity is the rule, but not at the expense of other important values.[19]

Our disagreement with the District Court can be traced in part to the complexity of this suit. Appellants do not present one cause of action, but rather seek damages under both Title III and Fourth Amendment. And the constitutional basis for their suit involves both the warrant requirement of *Keith* and *Zweibon I* and the question whether the wiretap was reasonable even if no warrant was necessary. We think the retroactivity decision must be tailored to each particular cause of action. More important, we emphasize that the suit before us is not a criminal case, but a civil damage action alleging a constitutional tort. We must take care that in considering retroactivity we appreciate the context of our determination.

There can be no question of novelty, and hence no retroactivity problem, as to two features of this case. First, because the "reasonableness" requirement of the Fourth Amendment was recognized at the time of the wiretap as a controlling standard for national security surveillances,[20] the District Court should have applied that standard to the wiretap as initiated and as conducted for six months. Second, in *Zweibon I* we assumed without deciding that the surveillance

---

[19] *See Chicot County Drainage District* v. *Baxter State Bank, supra* note 9, 308 U.S. at 374.

[20] *See Halperin* v. *Kissinger*, —— F.2d ——, —— (D.C. Cir. No. 77-2014, decided July 12, 1979) (slip op. at 16-17).

concerned national security matters,[21] and suggested that the District Court might inquire into this issue on remand.[22] Since then appellants have marshalled additional evidence suggesting that the primary motive behind the wiretap was criminal investigation, not national security.[23] If this proposition can be established at trial, the violation of the terms of Title III would be apparent, because appellees do not contend that they followed statutory procedures; and since the statute was enacted two years before the JDL surveillances, there would be no retroactivity question.[24]

## III

With respect to the retroactivity of the Fourth Amendment warrant requirement announced by *Keith*

---

[21] *See Zweibon I, supra* note 6, 516 F.2d at 612 n.39.

[22] *See id.* at 671 n.274: "[T]he trial court on remand will probably have to take additional testimony * * * in order to ascertain whether appellees in fact believed these wiretaps were being utilized to gather national security intelligence rather than to obtain evidence for criminal prosecutions * * *".

[23] Appellee Mitchell stated in a deposition that the Justice Department was concerned that the JDL would undertake assaults, bombings, and airplane hijackings, JA 232-233, and that the State Department was pressing his office for criminal prosecution of JDL members, JA 260, 261. In addition, the two FBI memoranda requesting wiretap authorization cite several suspected criminal violations. JA 68-71. Even without this evidence Judges McGowan and Robb concluded in *Zweibon I* that the surveillance should be viewed as part of a criminal investigation. 516 F.2d at 681-689.

[24] *See Halperin* v. *Kissinger, supra* note 20, —— F.2d at ——, slip op. at 23-24.

and *Zweibon I*, more extended analysis is required. In *Chevron Oil Co.* v. *Huson*[25] the Supreme Court offered a useful three-step test for prospectivity which was followed by the District Court in the case before us: (A) Did the court directly overrule precedent or announce a rule "not clearly foreshadowed"? (B) Is prospective application consistent with the "purpose and effect" of the rule? (C) Are there equitable considerations requiring prospective application? Because each of these considerations will have different effect in different cases, no single factor is controlling.

A

Appellants dispute the District Court's view that the application of the Fourth Amendment's warrant requirement to national security surveillances was "not clearly foreshadowed" by judicial decisions before these wiretaps were installed. Before *Keith* the Supreme Court had never ruled on the need under the Constitution for a warrant in national security surveillances,[26] but appellants urge that the trend of Supreme Court decisions was clear and that disagreement among the lower courts on this question could not justify the assumption that warrantless wiretapping was constitutional.[27] Moreover, appellants

---

[25] 404 U.S. 97, 106-107 (1971).

[26] *See Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967).

[27] In an April 1971 speech, while the JDL wiretaps were still in place, appellee Mitchell commented on that division among the lower courts. JA 327-328.

point to a memorandum to appellee Mitchell from the Solicitor General in 1969 that noted the Supreme Court's "great hostility" to attempts to limit the rights of those "suspected of engaging in subversive activities," and counselled against a court test of Executive power to wiretap without a warrant.[28]

Since *Keith* and *Zweibon I* did not overrule any earlier decisions, we must determine whether application of the warrant requirement to national security cases was "not clearly foreshadowed." The Supreme Court has phrased this question in terms of whether a new rule represents the resolution of "complex issues of first impression" [29] or "an avulsive change which caused the current of the law thereafter to flow between new banks." [30] *Keith* and *Zweibon I* were cases of first impression, but the complexity and avulsiveness of their holdings on the Fourth Amendment's warrant requirement are not manifest. Statements by the Supreme Court in the late 1960s certainly demonstrated great concern over unrestrained warrantless wiretapping.[31] Extension of that concern to

---

[28] JA 504-509.

[29] *Allen* v. *State Board of Elections*, *supra* note 17, 393 U.S. at 572.

[30] *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968).

[31] *See Alderman* v. *United States*, 394 U.S. 165 (1969); *Giordano* v. *United States*, 394 U.S. 310 (1969); *Taglianetti* v. *United States*, 394 U.S. 316 (1969); *Katz* v. *United States*, *supra* note 26; *Berger* v. *New York*, 388 U.S. 41 (1967).

the national security sphere was certainly likely, though perhaps not inevitable.[32]

We think the approach taken by the Seventh Circuit in *Dasho* v. *Susquehanna Corp.*[33] is appropriate here. That appeal challenged the trial court's refusal to permit a trial to the jury in a stockholder's derivative action. Then-Judge Stevens' opinion for the panel applied retroactively the Supreme Court's holding in *Ross* v. *Bernhard*[34] that stockholders have a right to a jury trial in such cases. Even though there had previously been a split among the circuits on that issue, the *Dasho* court concluded that *Ross* "did not establish a new principle of law," but "merely resolved a conflict in the circuits consistently with the Court's interpretation of prior law."[35] We believe that *Keith* and *Zweibon I* also did not announce a new principle of law, but simply applied the constitutional warrant requirement to national security situations.[36]

---

[32] This seems especially true since in *Alderman* v. *United States, supra* note 31, the Supreme Court made no distinction in its application of the Fourth Amendment to defendants charged with conspiring to transmit murderous threats in interstate commerce, and to defendants alleged to have been engaged in espionage.

[33] *Supra* note 17.

[34] 396 U.S. 531 (1970).

[35] 461 F.2d at 21.

[36] Appellees' claimed reliance on prior Executive practice does not bear directly on our determination, since Executive actions cannot represent an authoritative source of constitutional standards. *Zweibon I, supra* note 6, 516 F.2d at 618-

As a result, we cannot say that the outcome in those cases was not clearly foreshadowed.

B

The second *Chevron Oil* standard focuses on whether retroactive overruling will promote or hinder the substantive rule announced in the crucial decision. Echoing the leading case on prospectivity of criminal rules, the District Court concluded that "[n]o amount of monetary damages can restore the privacy which was improperly invaded by the action of defendants * * *." [37] Accordingly, retroactive application of the warrant rule of *Keith* and *Zweibon I* in this case was not deemed to support the purpose of that rule. The court suggested that there might be a stronger basis for retroactive application of the warrant requirement in a criminal case where the exclusionary rule "constitutes a substantial and persuasive deterrent

---

619. And as to appellees' reference to lower court opinions, we note Cardozo's candid reflection:

> We will not help out the man who has trusted to the judgment of some inferior court. In his case, the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty. * * *

B. CARDOZO, *supra* note 12, at 147-148 (footnote omitted).

[37] *Zweibon* v. *Mitchell*, *supra* note 8, 444 F.Supp. at 1300. *Compare Linkletter* v. *Walker*, *supra* note 14, 381 U.S. at 637 ("[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.").

of government activity which is questionably illegal." [38]

The District Court's overemphasis on criminal law concepts in rejecting retroactivity in this *civil* case has led it into error. The principle announced in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics* [39] is that monetary damages are an entirely appropriate remedy for Fourth Amendment violations. After *Bivens* the Fourth Amendment cannot be said to be restricted to procedural rights in a criminal prosecution or to civil injunctive proceedings. In this suit the terms of that constitutional provision, including the warrant requirement, function like any standards for conduct that might involve tort liability. Unlike the District Court, we think

---

[38] *Zweibon* v. *Mitchell, supra* note 8, 444 F.Supp. at 1300. The District Court also claimed that retroactive application of the warrant requirement in a civil damage action would offend the policies behind official immunity doctrines. *Id.* We consider the District Court's concern on this score misplaced. The second *Chevron Oil* criterion focuses our attention on the purpose of the warrant requirement that is to be applied retroactively, not on the purpose of the immunity defense. Nevertheless, we disagree with the trial court's conclusion on the relationship between retroactivity and immunity doctrine. The availability of an immunity defense is unaffected by the outcome on the retroactivity issue, so we see no grounds for the fear that the purposes of the defense can be defeated by retroactive aplication of the warrant rule. Indeed, because immunity doctrine provides a defense for some individuals who might otherwise be held liable for acts undertaken before announcement of the warrant rule, *see* text at notes 48-49 *infra*, it supports retroactivity by preventing possibly unfair treatment of those defendants.

[39] 403 U.S. 388 (1971).

that a stronger case for prospectivity, rather than retroactivity, might be made in a criminal case involving the exclusionary rule, where the prophylactic purpose of that rule cannot be served by retroactive application and where the costs to society of retroactivity may be far greater.[40] In a damage action the effect of the warrant rule articulated in *Keith* and *Zweibon I* is to recognize a substantive right to compensation for injury.[41] Retroactive application would therefore seem fully consonant with those decisions and *Bivens*. That our ruling might have an incidental deterrent effect on official conduct in the future hardly establishes that retroactive application is improper because it will retard the effectiveness of the *Bivens* doctrine.[42]

But the analogy between this case and traditional tort doctrine may not be complete. Courts have indeed held tort defendants to a standard of conduct they could not have known before they performed

---

[40] *See* text at note 17 *supra*.

[41] *See Bivens, supra* note 39, 403 U.S. at 397: "[P]etitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment." Thus the Supreme Court's refusal in *Desist* v. *United States, supra* note 16, to give retroactive effect to the warrant requirement for wiretapping in criminal prosecutions announced in *Katz* v. *United States, supra* note 26, flowed from the deterrent purpose behind the exclusionary rule of *Katz*. Retroactive application obviously does not enhance such deterrence. Accordingly, we do not think that *Desist* dictates our decision today.

[42] *See Dasho* v. *Susquehanna Corp., supra* note 17, 461 F.2d at 21.

the actions giving rise to liability.[43] The basis for such rulings, however, is the conviction that the standards for tort liability probably have little impact on actual conduct,[44] and that if a retroactive standard is reasonable, "the conduct of right-minded men would not have been different if the rule embodied in the decision had been announced by statute in advance." [45] The analogous proposition that Fourth Amendment rules have only a minor impact on conduct may not be apt, since the standards of the Fourth Amendment were considered, though perhaps incorrectly gauged, in establishing the Government's policy on national security wiretaps.[46] Moreover, a clear purpose of the Fourth Amendment is to affect official conduct.

---

[43] A famous example is *Johnson* v. *Cadillac Motor Car Co.*, 221 F. 801 (2d Cir. 1915), where an automobile buyer sued the manufacturer for failing to inspect the car for defects. The Second Circuit ordered the District Court to dismiss the case, but before the lower court did so the New York Court of Appeals held for the first time that manufacturers did have a duty to inspect their cars for defects. *MacPherson* v. *Buick Motor Co.*, 111 N.E. 1050 (1916). The Second Circuit then reversed iteself and upheld plaintiff's claim in *Johnson* v. *Cadillac Motor Car Co.*, 261 F. 878 (2d Cir. 1919). *See Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) (dismissed suit for damages for disease contracted while employed by defendant is reinstated because Ohio Supreme Court subsequently recognized tort action for occupational diseases).

[44] *See* B. CARDOZO, *supra* note 12, at 145-146; Traynor, *supra* note 15, 28 HASTINGS L. J. at 545-546.

[45] B. CARDOZO, *supra* note 12, at 143.

[46] *See* JA 308-315 (Memorandum of May 6, 1969 to FBI Director from Attorney General).

Thus on this second *Chevron Oil* criterion we find that conflicting considerations yield no clear answer to the prospectivity question. As a standard of conduct to be applied in a civil tort suit, the warrant requirement is presumed to apply retroactivity. To the extent that the earlier standard, as understood, was the actual basis for the challenged surveillance, equitable concerns might be seen to require prospectivity only. Accordingly, we must explore the fairness of retroactivity in this situation.[47]

C

The central equitable concern in prospectivity decisions in damage actions is whether the defendants had notice of the new rule. If a truly new standard for liability has been promulgated, how can people be held to that rule for conduct preceding its announcement? In this case, however, where there was no "avulsive" change of law, the qualified immunity available to appellees ensures that no such inequitable result can occur. As we state today in *Halperin* v. *Kissinger*, Government officials sued for alleged violations of Title III or the Constitution in the performance of their official duties may offer as an affirmative defense (1) that they had reasonable grounds to believe their actions were legal, and (2)

---

[47] *See Desist* v. *United States*, *supra* note 16, 394 U.S. at 251 (fairness considerations enter "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity").

that there is no evidence that they acted in bad faith.[48] The first ground clearly covers the fairness problems we might face with this case. By establishing immunity for actions reasonably thought to be legal, there can be no danger that a defendant will be held to a standard of conduct he could not have known, so long as there is no showing that he acted in bad faith. And if bad faith were demonstrated there would be little weight to any individual's equitable claim for restricting *Keith* and *Zweibon I* to prospective effect.[49]

Consequently, we refuse to bar application of the warrant requirement of *Keith* and *Zweibon I* to this case. To do so would deny appellants the opportunity to seek compensation for constitutional deprivations they may have suffered while providing only a redundant protection for appellees. In such a situation there is no basis for straying from the presumption that judicial decisions operate both prospectively and retroactively.[50]

---

[48] *Halperin* v. *Kissinger*, *supra* note 20, —— F.2d at ——, slip op. at 33-37.

[49] Our rejection of the claim that *Keith* and *Zweibon I* should only be applied prospectively because they were not clearly foreshadowed, *see* text at notes 26-36 *supra*, should not be seen to undercut a claim of reasonable grounds for believing the legality of one's actions on the immunity issue. Contradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, but such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.

[50] In *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978), the Ninth Circuit refused to apply retroactively the warrant

## IV

The District Court also denied retroactive effects to the conclusion of the plurality in *Zweibon I* that the "procedures and remedies" of Title III should apply to unconstitutional national security wiretaps.[51] We believe that the *Chevron Oil* standards support that ruling.

We think it is plain from the opinion of the *Zweibon I* plurality that its position on the statutory question was not clearly foreshadowed. The plurality noted that *Keith*, the closest precedent, "offers only ambiguous guidance" on the impact of Title III on unconstitutional national security surveillances, and acknowledged "some merit" in the District Court's view that *Keith* completely bars application of Title

---

requirement of *Keith* after reviewing the *Chevron Oil* standards. Our disagreement with that court focuses on two points: (1) We do not think that the rule of *Keith* was not clearly foreshadowed, and (2) we believe that because qualified immunity protects potential defendants acting in good faith and in accordance with a reasonable understanding of applicable law, equitable considerations favor retroactivity to provide compensation for constitutional injury.

[51] *Zweibon* v. *Mitchell*, *supra* note 8, 444 F.Supp. at 1301. According to the *Zweibon I* plurality, national security surveillances that were subject to the Fourth Amendment's warrant requirement should also be held to Title III's procedures for acquiring a warrant, for judicial oversight of the surveillance, for record keeping, and for post-wiretap notification of surveillance targets, and the statute's civil remedy should be available in such instances. *Zweibon I*, *supra* note 6, 516 F.2d at 668-669.

III to national security wiretaps.[52] According to the plurality, the language of the statute and the legislative history are also "somewhat ambiguous" on this point.[53] In addition, there had been no judicial comment on the relationship between the Fourth Amendment's warrant requirement in national security situations and the provisions of Title III. The statutory issue was thus one of the first impression, and was quite complex, involving sophisticated analysis of *Keith* and of the legislative record.[54] The plurality's application of Title III to unconstitutional national security surveillance represented the sort of sharp break in the law which should be restricted to prospective effect.

In light of our conclusion in this case that the constitutional warrant requirement should have retroactive effect, the second and third *Chevron Oil* criteria support only prospective application of the position that Title III procedures and remedies are relevant to unconstitutional national security surveillances. Like the *Bivens* doctrine discussed above, the procedures and remedies of Title III have two dominant purposes: (1) to prevent or deter improper invasions of privacy, and (2) to provide compensation when such invasions occur. The deterrent purpose of Title III is necessarily forward-looking and hence not con-

---

[52] *Zweibon I, supra* note 6, 516 F.2d at 600, 662.

[53] *Id.* at 671.

[54] *See Allen* v. *State Board of Elections, supra* note 17, 393 U.S. at 572.

tingent upon retroactive application. And so long as plaintiffs have the opportunity to seek redress under the *Bivens* line of cases, we will not frustrate the compensatory purpose of the statute by denying retroactive effect to the view of the *Zweibon I* plurality involved here.[55] Finally, the availability of the constitutional remedy dilutes any equitable claim of these plaintiffs on this point.[56]

---

[55] This is particularly true of the procedural requirements of Title III. For the purposes of the retroactivity determination, we follow the *Zweibon I* plurality in considering together the procedural and remedial aspects of Title III. 516 F.2d at 664, 666, 669, 671. At one point the plurality does urge that "even if the *procedures* of Title III were inapplicable to national security wiretaps, the *remedies* of Title III should apply * * *." *Id.* at 664 (emphasis in original). This was not, however, the eventual position of the plurality, and we consider that statement as merely one step in the opinion's argument. To separate the procedural and remedial features of Title III in this context would be inconsistent with the plurality's view that "the procedures and remedies of the statute were to completely occupy the wiretapping field" as defined in "further judicial pronouncements * * *." *Id.* at 666 (emphasis deleted). We do not think Congress intended to provide in Title III a civil remedy for constitutional violations not subject to any other provisions of the statute.

[56] It might be argued that appellants here are entitled to the benefit of our decision in *Zweibon I* even if the rule announced is otherwise restricted to prospective application. This approach was followed by this court when it modified the standard for criminal insanity in *Durham* v. *United States*, 214 F.2d 862 (D.C. Cir. 1954), and by the Supreme Court in applying the exclusionary rule to the states in *Mapp* v. *Ohio*, *supra* note 14, and *Linkletter* v. *Walker*, *supra* note 14. *See Nga Li* v. *Yellow Cab Co.*, 532 P.2d 1226, 1244 (Cal.Sup.Ct. 1975) (overruling prospectively, with exception for plaintiff in that case, rule of contributory negligence). Two reasons for such

Accordingly, the judgment of the District Court is reversed on the retroactivity of the Fourth Amendment's warrant requirement and affirmed on the statutory question, and the case is remanded for further proceedings.[57]

*So ordered.*

---

a course have been offered: (1) unless the new rule is applied to the case at hand it represents "mere *dictum*," and (2) unless litigants can expect the benefit of rules announced in their cases, they will lack incentive to bring suits challenging old rules. *Molitor* v. *Kaneland Community Unit District No. 302*, 163 N.E.2d 89, 97-98 (Ill.Sup.Ct. 1959). Critics insist, however, that a "purely" prospective overruling will be understood as more than dictum, while adequate incentives for litigation already exist, including the presumption of retroactive effect. Moreover, the "this-litigant" exception may impose a substantial burden on the defendant in such cases, a burden that no other similarly situated individuals must carry. *See* Traynor, *supra* note 15, 28 HASTINGS L. J. at 559-562; Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 215-216 (1965); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 490-91 (1962). Because our decisions in this litigation have granted these plaintiffs substantial opportunity to seek redress for injuries they may have suffered, there is no need for such an exception to our limitation to prospective effect of the *Zweibon I* plurality's position on the statutory question.

[57] We decline appellants' invitation to assign this case to a different judge on remand. We are confident that the District Judge will follow this court's rulings and will faithfully discharge his judicial obligations.

**APPENDIX B**

# UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

September Term, 1978

Civil No. 2025-71

No. 78-1348

[Filed Jul. 12, 1979]

BERTRAM ZWEIBON, ET AL., APPELLANTS

*v.*

JOHN N. MITCHELL, Individually and as Attorney General of the United States, ET AL.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

Before: WRIGHT, Chief Judge, ROBINSON, Circuit Judge, and GESELL,* District Judge

---

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

## JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed on the retroactivity of the Fourth Amendment's warrant requirement and affirmed on the statutory question, and the case is remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

*Per Curiam*
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: July 12, 1979

Opinion for the Court filed by Chief Judge WRIGHT.

## APPENDIX C

Civ. A. No. 2025-71

BERTRAM ZWEIBON ET AL., PLAINTIFFS,

*v.*

JOHN N. MITCHELL ET AL., DEFENDANTS

United States District Court
District of Columbia
Civil Division

Feb. 9, 1978

## MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

This action is before the Court upon defendants' renewed motion for summary judgment. To facilitate an appreciation of the issues currently before this Court, we believe it appropriate to present the background of this litigation.

A. *History of this Action.*

This civil damage action constitutes a challenge to warrantless electronic surveillance of the offices of the Jewish Defense League (JDL) conducted by personnel of the Federal Bureau of Investigation [1] in October 1970 and from January 5 through July 3,

---

[1] Plaintiffs have not opposed the dismissal as to these individuals, nine in number, originally named in the complaint.

1971, as authorized by then-Attorney General John N. Mitchell. Mr. Mitchell authorized the surveillances during a period of JDL harassment of personnel of the Soviet Union located in New York City, ostensibly in an effort to protect the ability of the President to conduct and maintain peaceful relations between the United States and the Soviet Union. Plaintiffs argue that the warrantless surveillances violated their statutory rights under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (hereinafter Title III) and under 42 U.S.C. §§ 1983 and 1985, and their constitutional rights under the Fourth Amendment.

This Court on July 20, 1973 dismissed the action, entering summary judgment for defendants and denying plaintiffs' cross-motion for partial summary judgment on the issue of liability. 363 F.Supp. 936 (D.D.C. 1973). We determined that the surveillance was conducted pursuant to the President's national security powers and therefore was not cognizable under Title III or under the Fourth Amendment. 363 F.Supp. at 942-44. Our holding was reversed by the United States Court of Appeals for the District of Columbia Circuit *en banc*, a majority concluding that the Fourth Amendment required a warrant and a plurality determining that Title III also mandated the issuance of a warrant in the circumstances presented in the subject case. *Zweibon* v. *Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). In its remand of the case to this Court,

the Court of Appeals directed our attention to defendants' interposition of three affirmative defenses to an assessment of liability: (1) whether the Court's determination that the wiretaps were illegally instituted should be applied to establish liability for activity antedating the Supreme Court's decision in *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (hereinafter *Keith*), if the determination in this case were based upon the *Keith* decision; (2) whether the doctrine of official immunity insulated these defendants from liability for these actions performed in their official capacities; and (3) whether damage relief should be denied because defendants acted in the good faith belief that their actions were lawful. 170 U.S.App.D.C. at 13, 516 F.2d at 607, n. 18.

Defendants have not advanced the second defense in their renewed motion for summary judgment, preferring to reserve this issue until the Supreme Court rules on the question of official immunity in a constitutional tort context in *Butz* v. *Economou*, 535 F.2d 688 (2d Cir. 1976), *cert. granted*, 429 U.S. 1089, 97 S.Ct. 1097, 51 L.Ed.2d 534 (1977). *See* Memorandum of Points and Authorities in Support of Defendants' Renewed Cross-Motion for Summary Judgment, at 27, n. 18. We therefore decline to consider and evaluate the immunity defense at this time.

The third defense, that of good faith, is likewise not reached by the Court at this time.[2]

---

[2] The factual issues relating to the good faith defense are subject to a jury trial pursuant to the recent suggestion of

B. *Analysis.*

We therefore direct our attention to the issue of retroactive application of the *Keith* decision, framed by our Court of Appeals as follows:

> "If the illegality of these wiretaps is based upon the Supreme Court's decision in *Keith*, . . . there are strong factors which dictate that that decision should not be applied retroactively in this damage suit, which is based upon surveillance which occurred before the date of that decision."

170 U.S.App.D.C. at 13, 516 F.2d at 607, n. 18.

As a preliminary and necessary inquiry to our analysis of the retroactivity question, we note that the *en banc* Court of Appeals has found that "this case does indeed involve the foreign affairs of this country and therefore falls outside the holding in *Keith* and into the area it reserved for future disposition." 170 U.S.App.D.C. at 58, 516 F.2d at 652. Although the Court recognized that *Zweibon* presented an issue which the *Keith* decision had reserved for future disposition, it relied upon the *Keith* rationale to conclude that a warrant should have been secured before these electronic surveillances were instituted. *Zweibon* v. *Mitchell, supra,* 170 U.S.App.D.C. at 58-59, 516 F.2d at 652-53.

(1) *Constitutional cause of action.* We therefore turn our attention to the criteria summarized and endorsed by the Supreme Court in *Chevron Oil* v. *Hu-*

---

our Court of Appeals. *In re Bertram Zweibon,* 565 F.2d 742 (D.C. Cir. 1977).

*son*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971), for determining whether the ruling of the Court of Appeals should be applied prospectively only or whether liability should be assessed in this action. The Court presented the following guidelines:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for 'where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " [citations and quotations omitted].

We have concluded that application of these criteria compels a determination that this decision should be applied prospectively only and that civil damage liability for the illegal electronic surveillance should not be assessed in this action. We analyze the *Chevron* criteria consecutively.

(a) New principle of law. First, we believe that the *Zweibon* decision established a new principle of law. The necessity of securing a warrant prior to the

institution of electronic surveillance of domestic organizations in situations where the national security is involved had not been judicially determined prior to its presentation in this litigation.[3] In *Katz* v. *United States*, 389 U.S. 347, 358, n. 23, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), while holding for the first time that the warrant requirement of the Fourth Amendment was applicable to electronic surveillances, specifically reserved the question of the applicability of the warrant requirements to national security surveillances. Undeniably, at the time these wiretaps were installed in 1970 and 1971, the question of their legality had not (and still has not) been adjudicated by the Supreme Court. Not until 1972 did the Supreme Court, in a matter of first impression, determine that the warrant requirements of the Fourth

---

[3] Throughout this opinion we will refer to security surveillances pursuant to the following categorization: surveillances of domestic organizations impacting on purely domestic activities as "domestic security" surveillances; surveillances of domestic organizations which are independent of foreign influence but impact on the conduct of foreign affairs (the present factual situation) as "domestic national security" surveillances; and to surveillances of foreign organizations as "foreign national security" surveillances. "Foreign security" surveillances shall encompass the latter two categories. The Court of Appeals in treating this case as "foreign security surveillance" (170 U.S.App.D.C. at 19, 516 F.2d at 613, n. 42) has determined that a warrant must be obtained before a domestic national security wiretap is installed. *Zweibon* v. *Mitchell, supra,* 170 U.S.App.D.C. 20, 516 F.2d 514. We employ this terminology merely to facilitate discussion of the law as it has evolved through recent judicial decisions.

Amendment were applicable to domestic security surveillances. *Keith, supra,* 407 U.S. at 299, 92 S.Ct. 2125. Finally, in 1975, this case presented for the first time the question of the applicability of the warrant requirements for domestic national security surveillances. This is the first case to draw a distinction between the types of foreign security surveillances.

Furthermore, we conclude that the Court of Appeals' resolution of this controversy was not "clearly foreshadowed" at the time these surveillances were instituted over seven years ago. In fact, caselaw and historical precedent at that time indicated that a contrary resolution would be forthcoming from any court reviewing warrantless wiretaps in the national security—and particularly the foreign security—context. District courts had consistently held that a warrant was not required in such circumstances. *See United States* v. *O'Neal,* Cr. No. KC CR 1204 (D.Kan., Dec. 1, 1970); *United States* v. *Dellinger,* No. 69 CR 180 (N.D.Ill., Feb. 20, 1970). *See also United States* v. *Smith,* 321 F.Supp. 424, 429 (C.D. Cal.1971) (applicability of warrant requirement to foreign national security surveillances reserved, although warrant mandated for domestic security surveillances). In addition, warrantless national security electronic surveillances had been consistently conducted for more than 25 years by Attorneys General without judicial or Congressional intrusion. *See Keith, supra,* at 299. It is in recognition of these considerations that we reach our determination that

the facts of this case satisfy the first part of the *Chevron* test.[4]

(b) Purpose and effect of the rule. For our analysis of the remaining two factors of the *Chevron* retroactivity test, we rely heavily upon the well reasoned memorandum of Judge Gasch in *Sinclair* v. *Kleindienst*, No. 610-73 at 6 (D.D.C. Sept. 23, 1977), analyzing the question of retroactive application of *Zweibon* in the context of domestic security surveillances. We believe that the purposes of the Fourth Amendment will not be advanced by a retroactive application of the Court of Appeals' determination that a warrantless domestic national security electronic surveillance is unconstitutional. The effect of the Court's determination of unconstitutionality will be the protection of an individual's interest in privacy against warrantless domestic national security electronic surveillances. No amount of monetary damages can restore the privacy which was improperly invaded by the action of defendants in the subject conduct. Furthermore, plaintiffs have achieved the result

---

[4] This conclusion is strongly supported by the determination by Judge Gasch that the illegality of warantless domestic security wiretaps was not "clearly foreshadowed" prior to *Keith*. *Sinclair* v. *Kleindienst*, No. 610-73 at 6 (D.D.C. Sept. 23, 1977). We believe that our controversy presents an even more compelling case for nonretroactivity than *Sinclair* since a domestic *national* security wiretap involves, to however limited a degree, the President's ability to conduct foreign relations, which is an essential ingredient to any exemption from the warrant requirement that potentially may emanate from our Court of Appeals. *See Zweibon* v. *Mitchell, supra*, 170 U.S.App.D.C. at 20, 516 F.2d at 614.

envisioned by the Fourth Amendment: the Department of Justice's electronic surveillance policy was revised following the Supreme Court decision in *Keith* and accommodated the directive of the *Zweibon* decision. *See* Statement of Attorney General Edward H. Levi, July 9, 1975 (Exhibit 8, Appendix to Defendants' Renewed Motion for Summary Judgment).

We are further persuaded by Judge Gasch's assessment in *Sinclair* that retroactive application of an illegality determination in criminal cases via the exclusionary rule might be appropriate in a given situation while a retroactive creation of a civil damage cause of action for the same privacy intrusion might be inappropriate. *Sinclair* v. *Kleindienst*, *supra*, at 6-7. *See Marks* v. *United States*, 430 U.S. 188, 196-97, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); *Morales* v. *Hamilton*, 391 F.Supp. 85 (D.Ariz.1975). Precluding usage of illegally secured evidence pursuant to the exclusionary rule in the very case in which the evidence has been deemed to be illegally procured constitutes a substantial and persuasive deterrent of government activity which is questionably illegal. We believe that the policies supporting the doctrines of official and sovereign immunity would be offended by retroactive creation of a civil damage cause of action which would subject public officials to personal liability for reasonable but erroneous interpretations in unsettled areas of constitutional law. *See Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.). In addition, the retroactive establishment of a cause of action to create liability for prior con-

duct under the facts of this case might very well violate defendants' constitutional rights under the Fifth Amendment and, in the matter of the statutory cause of action, could raise important problems implicit in the constitutional prohibition against *ex post facto* legislation. *U.S.Const.* Art. I, § 9, Cl. 3. *See Morales* v. *Hamilton, supra,* at 88.

(c) Equitable concerns. The third factor in the *Chevron* analysis is similarly satisfied here. We believe that the creation of personal liability for conduct consistent with the then prevailing statutory or constitutional norms and with long standing historical precedent is precisely the form of injustice or hardship which a holding of nonretroactivity could, and indeed should be implemented to, avoid. We reach this determination fully cognizant of, but unpersuaded by, plaintiffs' assertions that a nonretroactive application will frustrate honest and well-motivated litigation to redress constitutional wrongs. We have balanced the equitable interests presented and feel confident that the results of such balancing support our determination. This is not to be interpreted as a minimization of the privacy interest admittedly violated by the illegal actions of these defendants; the significance of the right invaded is not determinative in a retroactivity analysis. *See Cipriano* v. *City of Houma,* 395 U.S. 701, 706, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (determination of statute's unconstitutional deprivation of right to vote applied prospectively only).

We therefore find that, "insofar as the rules of law established in *Keith* and *Zweibon* are to serve

as the basis for civil liability, they should be limited to prospective application only." *Sinclair* v. *Kleindienst, supra,* at 7.

(2) *Statutory causes of action.* The foregoing analysis of the retroactivity question in the constitutional context similarly is dispositive of plaintiffs' claim for relief under Title III. Any alleged illegality of the electronic surveillances of 1970 and 1971 involved in this action under Title III must be founded upon the subsequent Supreme Court determination in 1972 in *Keith,* and upon the Court of Appeals' determination in 1975 in *Zweibon* that the warrant requirement of the Fourth Amendment was applicable to domestic national security surveillances.[5] *See Zweibon* v. *Mitchell, supra,* 170 U.S.App.D.C. at 77-78, 516 F.2d at 671-72 & n. 276 (applicability of Title III dependent upon future constitutional law determinations).

---

[5] This disposition makes it unnecessary to determine the precedential significance of the plurality opinion of the *en banc* Court of Appeals that Title III applies to all electronic surveillances for which a search warrant is constitutionally required. Absent this expression by a plurality of the Court, we would adhere to our original conclusion of law that Congress, by Title III, did not attempt to legislate with respect to the national security powers of the President. 363 F.Supp. 942. *See* 18 U.S.C. § 2511(3) ("Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect [the national security]"); this conclusion is not without support. *Zweibon* v. *Mitchell, supra,* 170 U.S.App.D.C. at 98-99, 111, 516 F.2d at 692-93, 706 (opinions of Judge Wilkey and Judge MacKinnon, respectively); *United States* v. *Smith, supra,* at 425.

We therefore hold that plaintiff may not achieve the benefit of the statutory relief provisions of Title III.

We believe that a similar disposition of the claim as advanced under 42 U.S.C. §§ 1983 and 1985 is appropriate.

C. *Conclusion.*

For these reasons, we hold that plaintiffs are not entitled to the relief sought and that defendants' renewed motion for summary judgment should be granted. In view of our determination, it is not necessary to reach the separate affirmative defenses of good faith and official immunity.

An Order consistent with the foregoing has been entered this day.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305425 131

Nos. 79-881 and 79-883

# In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN N. MITCHELL, PETITIONER

*v.*

BERTRAM ZWEIBON, ET AL.

BERTRAM ZWEIBON, ET AL., PETITIONERS

*v.*

JOHN N. MITCHELL

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**SUPPLEMENTAL MEMORANDUM FOR PETITIONER AND CROSS-RESPONDENT**

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

No. 79-881

JOHN N. MITCHELL, PETITIONER

*v.*

BERTRAM ZWEIBON, ET AL.

---

No. 79-883

BERTRAM ZWEIBON, ET AL., PETITIONERS

*v.*

JOHN N. MITCHELL

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## SUPPLEMENTAL MEMORANDUM FOR PETITIONER AND CROSS-RESPONDENT

---

1. In its initial decision in this case, a plurality of the court of appeals held that "the procedures and remedies of [Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*] completely occupy the wiretapping field except to the extent the President's powers were rendered constitutionally immune from the warrant procedure of the Fourth Amendment." 516 F. 2d 594, 666 (1975) (*Zweibon I*) (emphasis deleted).

The court further held that "the relevant standard of good faith in this case * * * [would not be] that literally specified in Section 2520" (516 F. 2d at 670-671; *id.* at 688 (Robb, J., concurring in part)),[1] which provides a "complete defense" for wiretaps authorized in "good faith reliance on a court order or legislative authorization," 18 U.S.C. 2520. Instead, the court held that a "good faith defense to liability, whether under the *Bivens* rationale or the statutory theory, will be established if appellees can demonstrate (1) that they had a subjective good faith belief that it was constitutional to install warrantless wiretaps under the circumstances of this case; and (2) that this belief was itself reasonable." 516 F. 2d at 671 (footnote omitted).

2. Respondents' supplementary memorandum now argues that this holding is in conflict with a recent decision of another court of appeals in *Campiti* v. *Walonis*, No. 79-1213 (1st Cir. Dec. 18, 1979). They urge this conflict as an additional ground for review.[2]

We do not agree that the decision in *Campiti* conflicts with the holding in *Zweibon I* concerning the scope of the statutory good-faith immunity in actions under Title III.[3] More important, however, the question that respondents address in their supplementary memorandum was not

---

[1]Chief Judge Bazelon did not join in this portion of the plurality opinion, believing instead that petitioner and other Attorneys General who misinterpret the law should be strictly liable. 516 F. 2d at 679-681.

[2]Respondent incorrectly state (Resp. Supp. Mem. 3) that the statutory defense in Title III (18 U.S.C. 2520) was not raised in this case. The defense was raised but was not reached by the court due to its disposition of the other issues.

[3]*Campiti* did not concern the type of situation before the court of appeals in *Zweibon I*, which involved the retroactive application of newly developed rules of constitutional law to establish liability under Title III. See 516 F. 2d at 671, 672.

raised either in the petition (No. 79-881) or in respondents' cross-petition (No. 79-883).[4] It is therefore not properly framed for review and, even assuming that the petitions are granted, should not be considered by the Court. See Sup. Ct. R. 23(c); *Whirlpool Corp.* v. *Marshall*, No. 78-1870 (Feb. 26, 1980), slip op. 6 n.10.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

FEBRUARY 1980

[4]Respondents simply mentioned this issue *en passant* in their original memorandum in response to the petition (Mem. 3). The issue is not addressed even obliquely in respondents' cross-petition. It also is not comprised within either of the questions presented in the cross-petition (79-883 Pet. 2).

No. 79-881

JUN 17 1981
ALEXANDER L. STEVAS
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

JOHN N. MITCHELL, PETITIONER

*v.*

BERTRAM ZWEIBON, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

---

WADE H. MCCREE, JR.
*Solicitor General*

STUART E. SCHIFFER
*Acting Assistant Attorney General*

BARBARA L. HERWIG
LARRY L. GREGG
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 | 3, 5 |
| *Butz* v. *Economou*, 438 U.S. 478 | 2, 3, 4, 7 |
| *Forsyth* v. *Kleindienst*, 599 F.2d 1203, petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980) | 2, 7 |
| *Imbler* v. *Pachtman*, 424 U.S. 409 | 4, 6 |
| *Kissinger* v. *Halperin*, 606 F.2d 1192, cert. granted, No. 79-880 (May 19, 1980) | 1, 2 |
| *Pierson* v. *Ray*, 386 U.S. 547 | 5, 7 |
| *Procunier* v. *Navarette*, 434 U.S. 555 | 7 |
| *Robinson* v. *Pottinger*, 376 F.Supp. 615, aff'd, 512 F.2d 775 | 4 |
| *Stump* v. *Sparkman*, 435 U.S. 349 | 3, 5 |
| *United States* v. *Nixon*, 418 U.S. 683 | 6 |
| *United States* v. *United States District Court*, 407 U.S. 297 | 3, 4 |
| *Zweibon* v. *Mitchell*, 516 F.2d 594 | 4 |
| Constitution and statutes: | |
| United States Constitution: | |
| Article II | 3 |
| Fourth Amendment | 3 |
| 28 U.S.C. 511-513 | 3 |

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

No. 79-881

JOHN N. MITCHELL, PETITIONER

*v.*

BERTRAM ZWEIBON, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

---

The petition in this case advised the Court that the three questions presented were identical to the questions of immunity and retroactivity presented in *Kissinger* v. *Halperin, cert. granted,* No. 79-880, (May 19, 1980), and it therefore suggested that the Court hold this case pending the decision in *Kissinger.* After the Court granted certiorari in *Kissinger,* however, we concluded that it was unnecessary in that case for the Court to reach any question of an independent immunity for the Attorney General, because of the close nexus between presidential directives and the particular conduct at issue in *Kissinger* (Br. 50 n.44). By contrast, this case and the companion case of *Mitchell* v. *Forsyth,* No. 79-1120, necessarily present the question of the independent

immunity of the Attorney General from personal damages liability for acting on behalf of the President to authorize electronic surveillance for national security purposes. Respondents in this case have filed a brief amicus curiae in *Kissinger* urging that an Attorney General is not entitled to an independent absolute immunity. This supplemental memorandum is submitted in further support of the petition and in response to that argument.

Respondents argue that the Court's decision in *Butz* v. *Economou*, 438 U.S. 478 (1978), precludes absolute immunity for an Attorney General in the absence of some element of presidential involvement (Amicus Br. 13-14). This reflects a fundamental misreading of the Court's opinion. Although *Economou* establishes a general rule that Executive Branch officials sued personally for alleged violation of constitutional rights are protected only by a qualified immunity, the Court expressly recognized that "there are some officials whose special functions require a full exemption from liability" and that there would be "exceptional situations where it [can be] demonstrated that absolute immunity is essential for the conduct of the public business" (438 U.S. at 507).[1] The responsibility of the Attorney General to assess and determine the state of the law and then

---

[1] The Court in *Economou* (438 U.S. at 508-517) went on to hold that absolute immunity would be available for those executive functions that are analogous to judicial and quasi-judicial responsibilities. The courts of appeals have interpreted the Court's decision narrowly to hold that *only* those executive functions are protected by absolute immunity. See, *e.g.*, *Halperin* v. *Kissinger*, 606 F.2d 1192, 1208 (D.C. Cir. 1979), cert. granted, No. 79-880 (May 19, 1980); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1214-1215 (3d Cir. 1979), petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980).

to take action required in the national interest in light of that determination is an aspect of the public business requiring the protection of absolute immunity. Indeed, these functions are closely analogous to those that the Court held were protected in *Butz* v. *Economou*, *supra*.

The Attorney General is the Executive Branch official to whom ultimate responsibility for authoritative interpretation of the law within that Branch has been assigned. See 28 U.S.C. 511-513. As this Court has recognized in approving absolute immunity for judges, interpreting the law is an extremely difficult function that requires a broad scope of discretion unimpeded by the threat of personal damages liability. See *Stump* v. *Sparkman*, 435 U.S. 349, 355 (1978); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871).[2] The necessity of protecting the unfettered exercise of this discretion by the Attorney General is particularly acute in the circumstances of this case, in which Fourth Amendment interests had to be balanced against inherent presidential powers under Article II of the Constitution in the absence of any clear judicial ruling. See *United States* v. *United States District Court*, 407 U.S. 297, 299 (1972) (resolution of the legal question "requir[es] sensitiv-

---

[2] The argument advanced in the government's brief in *Kissinger* (at 49 & n.42), regarding the need for absolute immunity to allow the Attorney General to advise the President freely without fear of personal damages liability, applies with equal force to support an independent immunity to protect the functions exercised by the Attorney General in this case. In *Kissinger*, the Attorney General's function was to advise the President of the legality of a wire interception; here, it was the Attorney General's responsibility to take action to institute the wire interception, as well as to make the legal determination involved in *Kissinger*.

ity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.").[3]

The Attorney General cannot be constrained to act only when the lawful course is clearly established by judicial decision. Because the Attorney General (like a judge) is often called upon to give legal advice or make decisions in areas that are at the frontiers of the law, he necessarily risks exposure to retaliatory suits by those affected by his decision. See *Butz* v. *Economou*, *supra*, 438 U.S. at 510; *Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976). A refusal to recognize an absolute immunity from damages liability as a result of this advice or decision-making would impose a serious burden on the effective conduct of the public business.

The Attorney General and the Department of Justice play a unique role in the administration of justice and the development of the law.[4] Because of the difficulty and novelty of the legal issues that confront

---

[3] The constitutional issue becomes even more complex where foreign security concerns prompt an electronic surveillance. Although this Court has not yet considered this issue (compare *United States* v. *United States District Court*, *supra*, 407 U.S. at 309 n.8 with *id.* at 321-322), the court of appeals held for the first time in 1975 that the instant surveillance required prior judicial authorization (*Zweibon* v. *Mitchell*, 516 F.2d 594, 611-659 (D.C. Cir. 1975)).

[4] Among other duties, Congress has imposed upon the Attorney General the obligation to appear in litigation whenever an interest of the United States is involved (28 U.S.C. 517). See *Robinson* v. *Pottinger*, 376 F.Supp. 615, 619 (M.D.Ala. 1974), aff'd, 512 F.2d 775 (5th Cir. 1975) (suit against Assistant Attorney General for advising that proposed statute might be unconstitutional).

the Attorney General, it can be expected that courts will not always agree with his considered legal conclusions. But the court of appeals essentially held that each time the judiciary disagrees with the Attorney General's legal determination and an aggrieved party brings suit claiming malice or bad faith, the Attorney General must affirmatively establish his personal good faith in the performance of his office. Such a burden would be regarded as intolerable if imposed on the district courts or courts of appeals each time one of their decisions was set aside on appeal. See *Stump* v. *Sparkman*, *supra*, 435 U.S. at 359-360; *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 349. The burden can no more easily be borne by the Attorney General. Under the holding of this case, he must prove his good faith by testimony and evidence submitted in lawsuits brought (as here) years after the relevant events have transpired. And the Attorney General might have to explain to a lay jury why he elected one rather than another interpretation of a complex question of law. The imposition of this burden on the Attorney General "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967).

This case illustrates the risks inherent in requiring the Attorney General to establish the good faith and reasonableness of his legal determinations. Rather than commending petitioner for seeking advice from subordinates in the Department of Justice before reaching his own conclusions on a significant and unresolved legal question, both the court of appeals (Pet. App. 10a-11a) and the respondents in their *Kissinger* amicus brief (Amicus Br. 15-18) fault petitioner for choosing among the varied opinions of his Assistant Attorneys General and Solicitor Gen-

eral.[5] Thus, respondents would invite the spectacle of a jury's attempting to weigh the testimony of these officials in order to probe petitioner's motives in deciding as he did (see *Kissinger* Reply Br. 17 n.11). Moreover, the threat that this internal advisory process would be exposed to public scrutiny in litigation might lead subordinates to "temper candor with a concern for appearances and for their own interests" when their advice is sought, "to the detriment of the decisionmaking process" (*United States* v. *Nixon*, 418 U.S. 683, 705 (1974)). Such a result would discourage informed decision-making by the Attorney General in discharging his unique responsibilities.

Finally, according the Attorney General an absolute immunity from damages liability based on the exercise of his discretion to interpret the law and to act thereon would not mean that there are no checks on his exercise of that discretion. Like a prosecutor, the Attorney General "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler* v. *Pachtman*, 424 U.S. 409, 429 & n.30 (1976). Additionally, as a cabinet official and law officer, the Attorney General's decisions and actions are subjected to a number of checks within the Ex-

---

[5] The advice is contained in memoranda to the Attorney General, which are included as an appendix to respondents' amicus brief in *Kissinger*. Because respondents have taken certain statements in the memoranda totally out of context, we would refer the Court to the memoranda themselves. Significantly, in no instance was petitioner advised that the type of foreign security surveillance involved in this case was unlawful under then-existing decisional law. See cases discussed at *Kissinger* Br. 56-57.

ecutive Branch, to congressional oversight, and to frequent judicial review.

In sum, although this Court previously has recognized that officials "cannot be expected to predict the future course of constitutional law" (*Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978), citing *Pierson* v. *Ray*, *supra*, 386 U.S. at 557), it is the Attorney General's statutory responsibility to do precisely that. Given the importance and difficulty of this task, the Attorney General should not be penalized for "mistakes in judgment, whether the mistake is one of law or fact" (*Butz* v. *Economou*, *supra*, 438 U.S. at 507). Absolute immunity to safeguard the Attorney General's ability to perform these responsibilities, therefore, is essential for the conduct of the office and in the public interest.

For these reasons, as well as those stated in the petition, if the disposition of this case is not governed by the Court's decision in *Kissinger*, the petition for a writ of certiorari should be granted.[6]

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

STUART E. SCHIFFER
*Acting Assistant Attorney General*

BARBARA L. HERWIG
LARRY L. GREGG
*Attorneys*

JUNE 1981

---

[6] This conclusion applies as well to the pending petition in *Mitchell* v. *Forsyth*, No. 79-1120. In addition, regardless of the Court's disposition of the petition in No. 79-881, we believe that the cross-petition filed in No. 79-883 should be granted for the reasons stated in the memorandum for the respondent in that case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 349151 511

79-881

Supreme Court, U.
FILED
DEC 28 1979
MICHAEL RODAK, JR., C

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-883

JOHN N. MITCHELL,

*Petitioner,*

*v.*

BERTRAM ZWEIBON, *et al.*,

*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR RESPONDENTS

NATHAN LEWIN
MARTIN D. MINSKER
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
*Attorneys for Respondents.*

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

---

No. 79-883

---

JOHN N. MITCHELL,

*Petitioner,*

*v.*

BERTRAM ZWEIBON, *et al.*,

*Respondents.*

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## MEMORANDUM FOR RESPONDENTS

---

The United States, representing the former Attorney General, has filed a petition for a writ of certiorari in this case stating that the "important and unsettled questions" presented by the decision below are "identical" to those presented in *Kissinger v. Halperin*, No. 79-880, in which the government has requested certiorari. We do not agree that the issues in the two cases are "identical" by any means. This case does not involve the liability of a former

President in any shape, manner, or form. Thus it is plain that pages 11-20 of the government's petition in *Kissinger v. Halperin*, No. 79-880, are totally irrelevant to this case.

There are, to be sure, issues in this case concerning the "immunity of high-level Executive Branch officials from damages liability" (Petition, p. 10), but those issues, *on the facts of this case*, were fully and finally resolved by this Court in *Butz v. Economou*, 438 U.S. 478 (1978), which held that a cabinet officer enjoys no greater immunity from civil suit than the qualified immunity possessed by a governor of a State. Compare *Scheuer v. Rhodes*, 416 U.S. 232 (1974). There has never been a scintilla of proof – or even a suggestion by any party or witness – that the warrantless wiretap which is at issue in this case was authorized by, or known to, former President Nixon. Consequently, the fact – if it be one – that no court "had ever ruled that the President of the United States may be held personally liable in money damages for the official acts that he takes during his conduct of office" – which the Solicitor General cites as impressive proof of the need for review by this Court (Petition, No. 79-880, p. 11) – has nothing to do with this lawsuit by members of the JDL against the former Attorney General. And the absence of any claim against the President is not affected by the Solicitor General's nonfactual definition of the Question Presented as being whether Mr. Mitchell is liable "for acting on behalf of the President" to authorize a wiretap. The assertion that President Nixon – like others before him – generally countenanced warrantless wiretaps for national security purposes does not make him a participant in this particular wiretap. Nor, since he has not been sued in this case, does a review of the President's immunity from civil liability affect this case.

We believe that at this point – eight years after the lawsuit was first instituted and after two erroneous attempts by the trial judge to conclude the case in the defendants' favor – it is about time that the parties proceed to the merits. But we recognize that there are important issues relating to civil liability in the decision below. These pertain generally to the "retroactivity" of the decision in this very case, and they invoke particularly the questions we have presented in our cross-petition, *Zweibon v. Mitchell,* No. 79-883. In addition, if the Court were to consider the question whether Mr. Mitchell is immune, to any degree, from civil liability because of his "high-level Executive Branch" position, it should also consider the question decided by the court of appeals on its first disposition of this case in 1975 (*Zweibon v. Mitchell,* 516 F.2d 594 (1975)). At that time, the court below held, admittedly contrary to a "literal interpretation" of 18 U.S.C. § 2520 (516 F.2d at 570) that a good-faith belief in the lawfulness of his conduct would be a complete defense to the former Attorney General in this lawsuit. The legislative history of the statute and its terms contradict this broad good-faith defense.[1]

If the government's suggested procedure were followed – *i.e.,* if this case were held on the Court's docket until *Kissinger v. Halperin,* No. 79-880, is briefed, argued and decided – the chances are that the resolution of that case would affect few, if any, important issues in *Zweibon v. Mitchell.* The only consequence would be that a case

---

[1] Since the question was not discussed when the court of appeals issued the decision now under review, we could not make it the basis for a cross-petition. In 1976, this Court denied certiorari on that issue when it was presented alone. However, if the Court were now to grant the government's petition and ours, it would be a waste of judicial resources to leave the "good-faith" issue unresolved until after a trial on the merits.

which is already eight years old would be deferred for another two years. On the other hand, if the government's petition for a writ of certiorari in this case were granted together with our cross-petition, the issues unique to this case – which may prove dispositive – would be considered and decided on this record. Consequently, although we regret any additional delay, we suggest that the Court grant the government's petition, No. 79-881, and our cross-petition, No. 79-883, so that the full range of issues – including the availability under 18 U.S.C. §2520 of a subjective good-faith defense – can be argued and decided.

Respectfully submitted,

NATHAN LEWIN
MARTIN D. MINSKER
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
*Attorneys for Respondents.*

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

---

**Nos. 79-881, 79-883**

---

JOHN N. MITCHELL,
*Petitioner and Cross-Respondent,*

*v.*

BERTRAM ZWEIBON, *et al.*,
*Respondents and Cross-Petitioners.*

---

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## SUPPLEMENTARY MEMORANDUM FOR RESPONDENTS AND CROSS-PETITIONERS

---

NATHAN LEWIN
MARTIN D. MINSKER
JAMIE S. GORELICK
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
*Attorneys for Respondents and Cross-Petitioners*

---

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

---

Nos. 79-881, 79-883

---

JOHN N. MITCHELL,
*Petitioner and Cross-Respondent,*

*v.*

BERTRAM ZWEIBON, *et al.*,
*Respondents and Cross-Petitioners.*

---

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## SUPPLEMENTARY MEMORANDUM FOR RESPONDENTS AND CROSS-PETITIONERS

---

In our Memorandum for Respondents filed in No. 79-881, we suggested that if this Court were to grant the government's petition for a writ of certiorari in that case, it should also grant our cross-petition in No. 79-883 and request that the parties brief and argue the issue which had been decided adversely to the plaintiffs by the court of appeals in 1975 – *i.e.*, whether the defendant's alleged good faith belief in the lawfulness of his conduct is a

valid defense notwithstanding the specific language of 18 U.S.C. §2520 which recognizes a good faith defense only if there has been reliance upon "a court order or legislative authorization." After we filed our Memorandum, we learned of a recent decision of the Court of Appeals for the First Circuit, not yet reported, which conflicts squarely with the ruling issued by the Court of Appeals for the District of Columbia Circuit in 1975 on this issue.

In *Campiti v. Walonis*, No. 79-1213, decided December 18, 1979 (reproduced as Appendix I, pp. 1a-17a, *infra*), a unanimous First Circuit rejected the contention that it is a defense under 18 U.S.C. §2520 if law enforcement personnel establish that they erroneously believed, in good faith, that their conduct was lawful. The Court of Appeals refused to "graft" onto Section 2520 the good faith immunity defense available to state officers in actions under 42 U.S.C. §1983. It said (p. 12a, *infra*):

> Since there was no "court order" or "legislative authorization," a literal reading of the statute eliminates any good faith defense. . . . What we have here is action taken not in reliance on legislative authorization, but on a completely erroneous belief that the statute did not apply to an extension phone or to prison officials. Appellants' good faith defense argument would mean that a defendant's interpretation of the statute, no matter how distorted, would be a complete defense to liability. The next logical step would be immunity based on the belief that the law was wrong and should not be obeyed.

There is now a square conflict between the First and District of Columbia Circuits as to the meaning of the good faith defense prescribed in 18 U.S.C. §2520. If the First Circuit is correct, the defendant in this case is liable under 28 U.S.C. §2520, irrespective of any alleged subjective "good faith," if he did not rely on "a court

order or legislative authorization." Since Mr. Mitchell has asserted no reliance upon either a court order or legislative authorization, application of the First Circuit's rule would mean that no trial would be necessary and that summary judgment could be entered for the plaintiffs.

This case has already consumed substantial judicial resources, and it will probably be taken to appellate courts by the losing party if there is a full trial. A resolution of this issue at the present juncture could result in a substantial saving of the time and energy of the courts and could significantly reduce the litigation expenses of all parties. Consequently, we request that, if writs of certiorari are granted, this Court direct the parties to brief and argue the meaning of the "good faith" defense of 18 U.S.C. §2520 and thereby resolve this conflict between circuits.

Respectfully submitted,

NATHAN LEWIN
MARTIN D. MINSKER
JAMIE S. GORELICK
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
*Attorneys for Respondents and Cross-Petitioners*

APPENDIX

# United States Court of Appeals
## For the First Circuit

No. 79-1213

FRANCESCO G. CAMPITI, ET AL.,

PLAINTIFFS-APPELLEES,

*v.*

MICHAEL A. WALONIS, ET AL.,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

*Lee Carl Bromberg*, Special Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, was on brief, for appellants.

*Max D. Stern*, with whom *Stern & Shapiro* was on brief, for appellees.

December 18, 1979

BOWNES, *Circuit Judge*. This is an appeal by defendants-appellants from a judgment of the district court holding them liable to plaintiffs-appellees in a 42 U.S.C. § 1983 civil rights action for intercepting and disclosing a telephone conversation in violation of Title III of The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. Defendants were also found liable in a pendent jurisdiction action brought pursuant to the Massachusetts statute covering the interception of wire communications, Mass. Gen. Laws ch. 272, § 99, which has a civil remedy provision, part Q, similar to the federal law.

Plaintiff Francesco Campiti was an inmate at Massachusetts Correctional Institute, Walpole (Walpole), at the time the telephone conversation was intercepted. Plaintiff Joseph Pioggia was at the Franklin County House of Correction. The defendants are Frank Hall, Massachusetts Commissioner of Corrections; Michael Walonis, an investigator for the Security Management Team (S.M.T.) of the Massachusetts Department of Corrections; Frank Gunther, Superintendent of Walpole; and Dennis Brown, Deputy Superintendent of Walpole.

The issues involve the applicability of the federal and state statutes and the defenses available under them.

*The Facts*

The district court's thoughtful and comprehensive opinion, *Campiti* v. *Walonis,* 453 F. Supp. 819 (D. Mass. 1978), contains a detailed exposition of the facts from which we borrow heavily.

On September 13, 1975, both plaintiffs were inmates of the Franklin County House of Correction. Starting that day, the Springfield Union, a newspaper circulated in the area, printed the first of a series of articles asserting that plaintiffs, along with certain other inmates, had been improperly receiving favored treatment, such as work release privileges and furloughs, from Sheriff Martin, the person in charge of the House of Correction. Because of the articles, defendant Hall transferred Campiti to Walpole where he was placed in a maximum security unit. Pioggia was not transferred to Walpole. Hall also ordered an S.M.T. investigation of conditions at the Franklin County House of Correction.[1] After arriving at Walpole, Campiti requested permission to telephone Sheriff Martin.

---

[1] An investigation by the District Attorney of Franklin County resulted in indictments against plaintiffs on February 6, 1976. After Campiti was acquitted on November 16, 1976, the case against Pioggia was dismissed.

On September 19, 1975, Walonis came to Walpole in connection with another S.M.T. investigation. He met with defendants Gunther and Brown in Gunther's office. During the meeting, Gunther brought up Campiti's request to call Sheriff Martin. It was agreed that permission to make the call should be given and that Walonis would monitor it. Walonis then went to the Outer Control Section of the prison where he would be able to listen to the conversation by using an extension telephone wired directly into the main switchboard. This extension phone was part of an override extension system at Walpole which can intercept any call. This system provides emergency contact with any part of the prison. It is also used to monitor inmate calls, which is done on an average of about two calls a week, or when there is reason to expect illegal inmate activity. The extension system is also used to monitor staff calls to ensure that they are not made for personal use.

Campiti was notified that he could call Sheriff Martin and was taken to Brown's office to do so. The call was put through via New England Tel. and Tel. lines by a prison officer, James Lambirth, who turned the phone over to Campiti after Martin was identified as being on the other end. After Campiti took the phone, Lambirth went into another office where he could hear the sound of Campiti's voice, but could not make out what he was saying. It was usual procedure for an officer to position himself so as to be able to hear and comprehend telephone calls made by a maximum security inmate. This was not done in this case because the officer knew the call was being monitored.

Walonis monitored the call, which took about five minutes, and made handwritten notes of the conversation. In addition to talking to Sheriff Martin, Campiti also talked to Pioggia. Walonis prepared a one page report on the call which was made part of the S.M.T. final investigation report. The contents of the call were disclosed to various

individuals, including, but not limited to, defendants Hall, Gunther, and Brown. Hall specifically authorized disclosure of the substance of the call to the Attorney General of Massachusetts, the Franklin County District Attorney, and a state police officer named George Powers.

The district court made specific findings which are not challenged on appeal. None of the participants in the call consented to or was aware that it was being monitored. Although appellants do not contest this finding, they do claim that consent and knowledge should be implied from the circumstances in which the call was made. The monitoring was uncovered during discovery procedures in another case, *see* footnote 1, *supra*. There were no regulations at Walpole informing inmates that telephone calls might be monitored. The usual method of monitoring inmate calls was by a prison officer remaining close enough to hear what the inmate said.

The district court also found that Walonis knew of the federal wiretap statute at the time he monitored the call, but thought that it only applied to a foreign device attached to a telephone line. He was unaware of the Massachusetts wiretap statute. The court noted, without making a finding, that Walonis testified that he believed then, and still believes, that monitoring an inmate call on institution equipment in a maximum security prison was perfectly legal. Defendants Gunther and Brown also held the same belief. The court found that Walonis, as a member of S.M.T., had never previously monitored a telephone call, although he had done so when he was a switchboard operator at Massachusetts Correctional Institute, Norfolk.

Appellants object to the finding of the district court that this monitoring was not reasonably related to maintaining internal security at Walpole. Our examination of the record convinces us that this finding was not clearly erroneous; in fact, it seems clearly correct.

II. *The Federal Statute*

The liability sections of the statute are 18 U.S.C. §§ 2511 (1)(a) and 2520. Section 2511(1)(a) subjects to criminal sanctions:

> any person who—
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication[.]

Civil actions are authorized under section 2520:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action againts any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A. *The Claimed Exclusions*

Appellants claim that, because of the equipment used and the circumstances under which the intercept was made, they come within specific exclusionary provisions of the statute. The first such provision relied on is in the definitions part of the statute, 18 U.S.C. § 2510(5)(a)(i) and (ii):

> (5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—
>
> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or used by a communications common carrier in the ordinary

> course of its business and being used by the subscriber or used in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties[.]

Appellants argue that, since Walonis was using an extension phone furnished by the telephone company in the ordinary course of its business and that his use was in the ordinary course of business at Walpole and/or was being used by him as a law enforcement officer in the ordinary course of his duties, there was no violation of the Act. This argument assumes as a predicate the key question: whether Walonis' use was "in the ordinary course of business at Walpole and/or whether Walonis' use was in the ordinary course of his duties" as a law enforcement officer.

Before we get to this issue, we first deal with appellants' assertion that an "extension phone" exemption has been carved out of the Act, excluding the use of extension phones from its prohibition. Appellants rely primarily on four cases, none of which we find controlling. In *Anonymous* v. *Anonymous,* 558 F.2d 677 (2d Cir. 1977), the Second Circuit held that the Act did not encompass the taping of a wife's telephone calls for use in a custody fight.[2] The court reasoned that, since what was involved was purely a domestic conflict, it did not rise to the level of a violation of the statute. *Id.* at 679. While the court in passing did state that a husband's listening in on the

---

[2] The court's reasoning was greatly influenced by Professor Herman Schwartz's testimony before the House Judicial Committee which resulted in the addition of the phrase "in the ordinary course of [the user's] business." Schwartz testified: "Now, we can see in certain circumstances where [the exemption] makes some sense. I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." *Anonymous* v. *Anonymous,* 558 F.2d 677, 679 (2d Cir. 1977).

telephone calls of his wife and daughter would be in the ordinary course of the user's business, *id.* at 678, there is no suggestion in the opinion that the use of an extension phone to monitor a call automatically triggers the exemption. *Simpson* v. *Simpson,* 490 F.2d 803 (5th Cir.), *cert. denied,* 419 U.S. 897 (1974), held, despite the finding "[t]he naked language of Title III, by virtue of its inclusiveness, reaches this case," *id.* at 805, that the secret recording of a wife's conversation by a husband for use in divorce proceedings was not covered by the Act.[3] We make no comment on the holding of *Simpson,* but point out that it did not involve the use of an extension phone and the decision was expressly "limited to the specific facts of the case." *Id.* at 810. *United States* v. *Christman,* 375 F. Supp. 1354 (N.D. Calif. 1974), involved the use of an extension phone system in a department store to monitor and record telephone calls of employees. In the course of its decision finding that the Act did not apply, the court stated: "An extension telephone is not an intercepting device within the meaning of the statute." *Id.* at 1355. We have serious reservations as to the correctness of the court's interpretation of the statute and flatly reject its conclusion as to the use of an extension phone. *Smith* v. *Wunker,* 356 F. Supp. 44 (S.D. Ohio, W.D. 1972), also relied on by appellants, is not apposite. It held that the recording of a private conversation by a party to it does not violate the statute.

We have been unable to divine any reason for an "extension telephone" exception. The purpose of the statute is

---

[3] *Simpson* has been severely criticized. In *United States* v. *Jones,* 542 F.2d 661, 669 (6th Cir. 1976), the court stated: "Our review of the legislative history of this section, testimony at congressional hearings, and debates on the floor of Congress, inescapably lead to the conclusion that 18 U.S.C. § 2511(a) establishes a broad prohibition on all private electronic surveillance for the purposes of marital litigation." *See also Kratz and Roehrs* v. *Kratz and Cadmus,* ___ F. Supp. ___ (E.D. Pa. No. 78-759, Aug. 23, 1979); *Remington* v. *Remington,* 393 F. Supp. 898, 901 (E.D. Pa. 1975).

to prohibit the secret monitoring of wire communications. Its application should not turn on the type of equipment that is used, but whether the privacy of telephone conversations has been invaded in a manner offensive to the words and intent of the Act.

This brings us to the nub of the issue, whether this intercept falls within the meaning of the phrases "in the ordinary course of business" or "in the ordinary course of duties" of a law enforcement officer.

Appellants have devoted a good portion of their brief to urging that this was routine monitoring and that Walonis' eavesdropping was pursuant to his official duties. The claim of routine monitoring flies in the face of the facts. The usual method of monitoring was for a guard to stand near enough to the caller to hear that end of the conversation. Walonis, moreover, had never engaged in telephone monitoring before as a member of S.M.T. The decision to have Walonis listen in on Campiti's call to Sheriff Martin was thus an exceptional course of conduct for both Walonis and the Walpole administration.[4] The facts lead to but one conclusion: the only reason Campiti was allowed to make the call was so that it could be monitored. Appellants find a "striking analogy" to this case in *Briggs* v. *American Air Filter Co.*, 455 F. Supp. 179 (N.D. Ga. 1978), which held that the use of an extension phone by an employer to determine if an employee was disclosing confidential business information to a competitor was a use "in the ordinary course of business". This reading flouts the words of the statute and establishes an exemption that is without basis in the legislative history of the Act.[5]

---

[4] We therefore need not decide whether, had this call been intercepted pursuant to an established prison policy of which the prisoners had been informed, the monitoring could permissibly qualify as part of the ordinary course of correctional officers' business within the purview of 18 U.S.C. § 2510(5)(a).

[5] The Senate Report declares that Title III created a flat ban on all unauthorized electronic surveillance: "Title III prohibits

We hold that 18 U.S.C. § 510(5)(a)(i) and (ii) does not provide the basis for a "prison exemption" from the Act.

Appellants next invoke section 2511(2)(a)(i) in an attempt to insulate the monitoring from the impact of the statute. This section provides:

> It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

It is hard for us to understand how this section applies to the use of an extension phone by someone other than an employee or agent of the telephone company. The section is obviously intended to allow the telephone company to intercept and disclose calls as a necessary protection of its equipment and rights: *United States* v. *Beckley*, 259 F. Supp. 567 (D. Ga. 1965) (telephone company may monitor calls to identify corrupt employee abusing long-distance system), *cited in* S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Ad. News 2182. *See United States* v. *Harvey*, 540 F.2d 1345, 1350-51 (8th Cir. 1976); *United States* v. *Freeman*, 524 F.2d 337, 340-41 (7th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976);

---

all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order . . . ." S.Rep. No. 1097, *reprinted in* 2 U.S. Code Cong. & Admin. News 1968, 90th Cong., 2d Sess., at p. 2113.

*United States* v. *Clegg*, 509 F.2d 605, 613 (5th Cir. 1975). Walonis was not an agent of the telephone company and the monitoring had nothing to do with telephone company equipment or rights. The case cited by appellants in support of their claim to the protection of this exception only reinforces our reading of this section of the statute. In *United States* v. *Savage*, 564 F.2d 728 (5th Cir. 1977), the Fifth Circuit held that this section applied to a situation in which a motel switchboard operator reported to the police a telephone conversation concerning criminal conduct which she had overheard. The call came in to the motel switchboard and, as operator, she put it through to the room of the party called. The court specifically found that the intercept was inadvertent. *Id.* at 730. This is just the opposite of the deliberate premeditated intercept in the instant case. Of even more significance is the fact that the court accepted as a matter of course and without discussion the district court's ruling that there *was* a violation of the Act when the switchboard operator turned her headset over to the policeman so that he could listen in on the telephone conversation. *Id.* at 731.

We hold that 18 U.S.C. § 2511(2)(a)(i) does not apply.

Appellants' final attempt to invoke an exemption provision of the statute focuses on section 2511(2)(c):

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

It is argued that, under the circumstances prevailing, Campiti gave his implied consent to the monitoring. The circumstances from which the implied consent allegedly flowed are: that he was in restricted custody, that the call

was placed for him by a staff officer,[6] that the common practice at Walpole of monitoring such calls, that the expectation of inmates was that calls would be monitored and that he kept the call short and the conversation innocuous. This boils down to the proposition that Campiti should have known his call would probably be monitored and he, therefore, gave consent. The only case advanced for this novel theory is one interpreting a similar but not identical provision of the wiretapping statute of Pennsylvania, *Commonwealth* v. *Gullet,* 329 A.2d 513, 518-19 (Pa. 1974). In *Gullet* an anonymous phone call was made to the police after a woman had been sexually assaulted and strangled. The caller informed the police as to the facts of the homicide, the location of the body, and hinted that this was the first in a series of killings. The call was later traced to the defendant. The Supreme Court of Pennsylvania, not unreasonably, found that permission to divulge the contents of the call was clearly implied. To accept appellants' theory of implied consent here would completely distort the plain words of section 2511(a)(c), legalizing an intercept where "one of the parties . . . has given prior consent to such interception." The district court did not err in finding that there was no consent for the monitoring. We hold that there was no implied consent.

B. *The Good Faith Defense*

The civil liability section of the Act, 18 U.S.C. § 2520, provides: "A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law."

---

[6] Appellants' claim, brief at 33, that the corrections officer remained in Campiti's presence during the call is at variance with the district court's explicit finding that he stepped into an outer office during the time Campiti was on the phone.

Appellants' argument, as we understand it, runs as follows. Since they relied on the statutory exemptions and acted in a good faith belief that the Act did not apply, they have a complete defense to this action. Appellants seek to avoid the specific requirements of "a court order or legislative authorization" by grafting onto this section of the statute the good faith immunity defense afforded police officers in 42 U.S.C. § 1983 civil rights actions. The cutting point for this graft is found in the following words from S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 2196: "A good faith reliance on a court order would constitute a complete defense to an action for damages. (*Compare Pierson* v. *Ray*, 87 S.Ct. 1213, 386 U.S. 547 (1967)." Appellants claim that this language evinces congressional intent to adopt the common law good faith immunity defense established in *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967): "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."

We note first that this part of section 2520 was amended in 1970 by inserting the words "legislative authorization" in place of "provisions of section 2518(7)." Pub. L. No. 97-358, title II, § 211(c), 84 Stat. 654. Part (7) of section 2518 authorizes emergency intercepts "with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime." Whatever the reason for the change,[7] it is clear that specifically requiring "legislative authorization" is more restrictive and precise than the language it supplanted.

---

[7] The legislative history suggests that the purposes of the change was to protect common carriers from liability for following the orders of law enforcement officials. 115 Cong. Rec. 37192-93 (1969) (remarks of Senator McLellan).

Since there was no "court order" or "legislative authorization," a literal reading of the statute eliminates any good faith defense. Nor do we think defendants are aided by the cryptic reference to *Pierson* v. *Ray* in the Senate Report. In *Pierson* v. *Ray,* 386 U.S. 547, there was legislative authorization. Section 2087 of the Mississippi Code was relied on by the police officers at the time of the arrest that gave rise to that case. Prior to the decision in *Pierson* v. *Ray,* but after the arrest, the Supreme Court in *Thomas* v. *Mississippi,* 380 U.S. 524 (1965), held that section of the Mississippi Code unconstitutional. In *Pierson* v. *Ray,* the Supreme Court held that "a police officer is not charged with predicting the future course of constitutional law." *Id.* at 557. Neither the reasoning nor the holding of *Pierson* v. *Ray* applies to this case. There was no state statute here authorizing the intercept; quite to the contrary, the Massachusetts wiretap statute, Mass. Gen. Laws ch. 272, § 91, specifically forbids such conduct. No future course of constitutional law" was involved at all. What we have here is action taken not in reliance on legislative authorization, but on a completely erroneous belief that the statute did not apply to an extension phone or to prison officials. Appellants' good faith defense argument would mean that a defendant's interpretation of the statute, no matter how distorted, would be a complete defense to liability. The next logical step would be immunity based on the belief that the law was wrong and should not be obeyed.

We hold that appellants are not entitled to invoke the statutory good faith defense.

II. *The Massachusetts Statute*

Appellants' argument as to the nonapplicability of the Massachusetts statute is a rerun of their claims for exemption under the federal statute. This is because the Massachusetts statute, with some minor variations, tracks the

Federal Act. In *Commonwealth* v. *Vitello,* 327 N.E.2d 819 (Mass. 1975), the Supreme Judicial Court made a comprehensive and detailed review of the Massachusetts law. It noted:

> Before we turn to the specifics of the provisions challenged by the defendants, we note that the Massachusetts statute in major portion matches section for section the provisions of Title III. Admittedly, the phraseology of our State statute is not word for word that of the Federal act. However, in substance the requirements of the Massachusetts statute are the same as those of Title III, as the legislative history of Title III shows that they should be.

*Id.* at 836. The Massachusetts court was aware of the role of a state statute in the fourth amendment area patterned on a federal law.

> Most importantly, although a State statute may adopt standards more stringent than the requirements of Federal law, thus excluding from State courts evidence that would be admissible in Federal Courts, a State may not adopt standards that are less restrictive than those set forth in Title III.

*Id.* at 833.

Appellants rely on the exemptions contained in Mass. Gen. Laws ch. 272, §§ 99B3, B4, and D1a.

As appellants recognize, section 99B3[8] is modeled on 18 U.S.C. § 2510(5)(a)(i). Their attempt to exclude the

---

[8] Mass. Gen. Laws ch. 272, § 99B3 provides: "The term 'intercepting device' means any device or apparatus which is capable of transmitting, receiving, amplifying, or recording a wire or oral communication other than a hearing aid or similar device which is being used to correct subnormal hearing to normal and other than any telephone or telegraph instrument, equipment, facility, or a component thereof, (a) furnished to a subscriber or user by a communications common carrier in the ordinary course of its business under its tariff and being used by the subscriber or user in the ordinary course of its business; or (b) being used by a communications common carrier in the ordinary course of its business."

use of an extension phone from the sweep of the Massachusetts Act fails as it did under the federal statute. The case relied on by appellants is not on point. In *Commonwealth* v. *Todisco*, 294 N.E.2d 860 (Mass. 1973), there was no discussion at all of the use of an extension telephone for secret eavesdropping. The case involved a valid warrant search of the premises of one suspected of using telephones fraudulently for gaming. When the police officers entered the premises, the receivers had been removed from the phones and they had a telephone repairman replace them. Defendant claimed that the replacement of the receivers was an intercepting device in violation of the Massachusetts statute. It was in this context that the court used the words that appellants have seized upon, "The clear and obvious legislative intent was to prevent the illegal use of devices external and extraneous to the regular telephone equipment." *Id.* at 865. The facts of the case render the comment inapposite to a deliberate secret intercept by the use of an extension phone.

Section B4 of the Massachusetts statute defines "interception" in terms of secretly hearing and secretly recording. "Intercept" under the federal statute is defined in terms of an "aural acquisition." 18 U.S.C. § 2510(4).[9] Appellants' argument on this point is a repeat of the implied consent argument that we have already rejected. The claim that the intercept was not secret because Campiti should have known that he would be monitored fails for the same reason. There is no implied knowledge exemption

---

[9] Mass. Gen. Laws ch. 272, § 99B4 provides: "The term 'interception' means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication[.]"

18 U.S.C. § 2510(4) provides: " 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

under the Massachusetts statute, just as there is no implied consent exemption under the federal statute. The only Massachusetts case bearing on this point is *Commonwealth* v. *Jackson*, 349 N.E.2d 337 (Mass. 1976). There, the court held that secret tape recordings made of telephone calls from a kidnapper should be suppressed, but allowed in evidence two calls during which the kidnapper stated that he knew his message was being taped. This hardly leads to the conclusion that, under the Massachusetts statute, implied knowledge obviates its secrecy requirement. The district court's finding that Campiti did not know the call would be monitored meets the Massachusetts statutory definition of a forbidden "interception."

Section D1a[10] of the Massachusetts statute, which tracks 18 U.S.C. § 2511(2)(a)(1), insulates an officer, employee, or agent of a communication common carrier from the proscriptions of the statute when engaged in activities necessary for the protection of the rights or property of the carrier. We reject this claim of exemption on the same grounds as we rejected the claim under the federal statute; Walonis was not acting as an officer, employee, or agent of the telephone company.

Finally, appellants assert that they are immune from liability because the intercept was made in good faith. The Massachusetts statute is much tighter in this regard than

---

[10] Mass. Gen. Laws ch. 272, § 99D1A provides: "It shall not be a violation of this section— a. for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of such communication, or which is necessary to prevent the use of such facilities in violation of section fourteen A of chapter two hundred and sixty-nine of the general laws; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

the federal statute. It provides: "Good faith reliance on a *warrant* issued under this section shall constitute a complete defense to an action brought under this paragraph" (emphasis added). Mass. Gen. Laws ch. 272, § 99Q3. Appellants attempt to transmute the words of the statute by incorporating into them the holding of *Gildea* v. *Ellershaw*, 298 N.E.2d 847 (Mass. 1973),

> that if a public officer, other than a judicial officer, is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision. and the decision and acts are within the scope of his duty, authority and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

*Id.* at 858-59. The case was brought by a former city manager against members of the Brockton City Council for attempting to remove him from office. The wiretap statute was not alluded to at all in the opinion and had no bearing on the case. No legislative history or Massachusetts case is offered as a basis for such a transmutation. We decline to rewrite the Massachusetts statute.

*Affirmed.*

Supreme Court, U. S.
FILED
MAR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

---

**Nos. 79-881, 79-883**

---

JOHN N. MITCHELL,
*Petitioner and Cross-Respondent,*

*v.*

BERTRAM ZWEIBON, *et al.*,
*Respondents and Cross-Petitioners.*

---

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS AND CROSS-PETITIONERS

---

NATHAN LEWIN
MARTIN D. MINSKER
JAMIE S. GORELICK
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400
*Attorneys for Respondents and Cross-Petitioners*

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

---

Nos. 79-881, 79-883

---

JOHN N. MITCHELL,
*Petitioner and Cross-Respondent,*

*v.*

BERTRAM ZWEIBON, *et al.*,
*Respondents and Cross-Petitioners.*

---

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

## SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS AND CROSS-PETITIONERS

---

In its Supplemental Memorandum for Petitioner and Cross-Respondents, the government asks that this Court not consider the question whether the defendant's alleged good faith belief that his conduct was constitutional is a valid defense notwithstanding the specific language of 18 U.S.C. § 2520 which recognizes a good faith defense only if there has been reliance upon "a court order or legislative authorization." The government's reason is

that this issue was not specified in our cross-petition as a question presented. The government's argument is unsound for at least three reasons:

***First***, the scope of the good faith defense was not, in fact, decided by the court of appeals in its most recent decision, and that question could not, therefore, technically have been enumerated in our cross-petition as a question presented by the decision below. The issue was decided by the court of appeals on the first appearance of the case before that court in 1975 (at which time we sought review of the issue in this Court by a petition for a writ of certiorari, which Mr. Mitchell opposed). We have requested that the issue be considered at this juncture—which would save judicial resources and might make it unnecessary for the parties to have recourse to this Court again—only because such a procedure seems logical and efficient. Moreover, the government's Response to our Cross-Petition in substance asks this Court to review and reverse those aspects of the court of appeals' 1975 ruling which were decided in our favor. Review of all issues determined by the court of appeals in 1975—including the scope of the good faith defense—would be even-handed and appropriate.

***Second***, our specific enumeration of this question when this Court is considering whether or not to grant a petition for a writ of certiorari surely obviates any prejudice which could arise from its omission as a question presented in the cross-petition. Unlike *Whirlpool Corp. v. Marshall*, 48 U.S.L.W. 4189, 4191 n.10 (U.S. Feb. 26, 1980), this is not a situation in which an issue omitted at the petition for writ of certiorari stage is sought to be raised belatedly during the briefing of the case on the merits. It would be exalting form over substance to preclude review of an issue that has been specifically

described and brought to the Court's attention before the decision on certiorari, merely because it was not separately itemized in the initial document filed with the Court.[1]

***Third***, the issue that the government is trying to foreclose with its Supplemental Memorandum is one which could be raised in this Court in the future if it is not considered now. If, after consideration of the issues in the Petition and Cross-Petition, there were a trial in the district court under the court of appeals' standard of good faith and if plaintiffs then found it necessary to seek review from a final judgment, that issue would still be open in this Court. *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 488 n.6 (1968); *Mercer v. Theriot*, 377 U.S. 152, 153-154 (1964); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923).

We have suggested that this Court review the good faith question if the petitions for writs of certiorari are granted because it would be reasonable and efficient to consider the principal legal issues heretofore decided in this case at one time rather than to fragment the questions in separate proceedings.[2]

---

[1]The government does not suggest that the Court is without power to consider this issue. Such an argument would be frivolous. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971). *See* R. Stern and E. Gressman, SUPREME COURT PRACTICE § 6.27 (5th ed. 1978).

[2]In this regard, it is also relevant that the complaint in this case was filed in 1971 and that the district court has twice erroneously (in the view of the court of appeals) granted summary judgment for the defendant, and once erroneously (in view of the court of appeals) denied plaintiffs a jury trial. *See* Cross-Petition for a Writ of Certiorari, No. 79-883, pp. 3-4. In view of this record, it is not in the interest of justice to subject the parties to further piecemeal litigation on an appellate level, particularly on the critical issue of the availability of the good faith defense.

For the foregoing reasons, we request that the parties be instructed to brief the question of the scope of the good faith defense in 18 U.S.C. § 2520 which was decided by the court of appeals in 1975.

Respectfully submitted,

NATHAN LEWIN
MARTIN D. MINSKER
JAMIE S. GORELICK

MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

*Attorneys for Respondents and Cross-Petitioners*

see 878 2

# sec 96 97 98 83